MANUAL OF JURISPRUDENCE;

ELEMENTARY ANALYSIS AND

EXPOSITION OF THE SCIENCE OF LAW.

"O God of my fathers, and Lord of mercy, who hast made "all things with thy Word, and ordained Man through thy "Wisdom, that he should have dominion over the creatures that "thou hast made, and order the World according to Equity and "Righteousness, and execute Judgment with an upright heart!"

WISDOM OF SOLOMON

"And like as in a natural body, as saith the philosopher, "the heart is the first that liveth, having within it blood, which "it distributeth among all the other members, whereby they are "quickned and do live, semblaly in a body politique, the intent "of the people is the first lively thing, having within it blood, that "is to say, politique provision for the utility and wealth of the "same people, which it dealeth forth and imparteth as well to the "head as to all the members of the same body, whereby the body "is nourished and maintained. Furthermore the Law under the "which a multitude of men is made a people, representeth the sem-"blance of sinews in the body-natural: because that, like as by "sinews the joyning of the body is made sound, so by the Law, "which taketh the name a ligando, *that is to wit, of binding, "such a mystical body is knit and preserved together: and the "members and bones of the same body, whereby is represented the "soundness of the wealth, whereby that body is sustained, do by "the laws, as the natural body by sinews, retein every one their "proper functions:—"*

FORTESCUE de laudibus legûm Angliæ.
(Mulcaster, trans. 1516)

A MANUAL OF JURISPRUDENCE,

BEING AN ELEMENTARY ANALYSIS AND EXPOSITION

OF THE SCIENCE OF LAW,

AS THE UNIVERSAL RULE AND BOND OF CIVIL SOCIETY;

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SECOND EDITION

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1862.

TO

SIR FREDERICK JAMES HALLIDAY, K. C. B.

FIRST LIEUT. GOVERNOR OF BENGAL,

TO WHOSE ENLIGHTENED POLICY AND ENCOURAGEMENT

IS DUE THE ESTABLISHMENT AND SUCCESS

OF THE SCHOOL OF LAW

IN THE PRESIDENCY COLLEGE, CALCUTTA,

THIS BOOK IS GRATEFULLY AND RESPECTFULLY

DEDICATED.

PREFACE

The first edition of this book was an epitome or abstract of portions of oral lectures delivered by the author as a Government professor, and was intended to be an *aide-memoire* to the student.

The present edition has a wider scope. It has been arranged, added to, and in several places re-written; so as to divest the whole, of what may be called an adversarial or note-book character.

The foot-notes are, for the most part, additions, containing such notices of comparative law, references, and discussion, as seemed not quite in keeping with the merely didactic and elementary cast of the text, and yet germane (as example, comparison, or analogy,) to the student's purpose. Such notes, however, (*i. e.* which range beyond the text,) must embarrass a beginner, who should pass them over, until, having mastered the principles and broad outlines of General Jurisprudence, he is qualified to apply these and to appreciate their illustration in the study of any particular jural system.

Still, this is but a *brochure*, suitable for the mere student, or for *dilettanti* readers of what may be termed Law-Philosophy. More suitable, perhaps, is it, for one initiated in and

fresh from early juridical studies, who desires to impress upon his memory and to recal what he has learnt: to such an one, this book may be a link, if not a step to more advanced, more complete knowledge, and a convenient manual.

To educated minds, disciplined by the usual or by any routine of methodical studies, the main principles of jurisprudence must, upon reflection, present themselves, and easily admit of scientific arrangement: in short, they are not a task for the memory, for the labour of research, but rather to be eliminated and recognised by abstract intellectual effort; to be thought out, not 'got up.' A guide is wanted, but to suggest, not to dictate. Such is a result of the writer's observation and experience.

A mere novice in the paths of philosophy, of science, of mental exercitation, should not approach this field of thought; inasmuch as he is unprovided, not only with indispensable working tools, but with needful equipment, even with inherent qualifications, for, though he may have vigour, he wants the suppleness and activity of limb, which he should not come here to get, but to apply.

With such views, it is but of-course to add, that the writer insists upon no dogmas: his aim is, to urge on, to aid his pupils and readers, that they may themselves handle, may study, may work out the outlines and principles of jurisprudence.

The reproach of M. Lerminier, 'pour la science du Droit proprement dite, l'Angleterre y sommeille toujours,' can cer-

tainly no longer be truthfully applied to the British Isles. The efforts of Drs. Maine, Heron and Whewell (although the latter be not a professional jurist), of the profound John Austin, of the accomplished James Reddie (of Glasgow), of Drs. Bowyer, Phillimore and Foster, not to mention more, may surely suffice to redeem our character, in this respect,—especially coupled as those labours are, with an awakened activity and determination in our Inns of Court, to foster and promote legal *science*, as something else than and preliminary, as well as collateral to legal *lore*. All, collectively, evinces, to say the least, a wakeful observance of the grandeur and need of studies which have occupied the mind of a Savigny, of a Grotius (and, of how many more eminent Germans, French, Italians!)—studies, which our Gallic neighbours have, as a nation, long worthily honoured and advanced.

Nor has the memory of the single-minded Bentham yet been rescued from that neutral and comparatively obscure fame to which they must ever (for a period) be condemned whose intelligence is in advance of their contemporaries.

The most distinguished of our English juridical scholars has recently given to the world a new chart of jurisprudence. *Ancient Law* (in itself, an era in the history of jural science) was first seen by the present writer just as the first edition of this manual had been published.

The title faintly, if at all expresses the significance and bearing of the work, which is a masterly development, from a select point of view, of the rise and progress of jural

doctrines. All *a priori* or natural rules, sentiments, necessity, —as an origin or basis or frame-work of jurisprudence—are discarded by the learned author. Records of what Mankind have devised and contrived as Law, are sought for and analysed, as the only valuable or reliable sources, grounds and causes of jurisprudence, ancient or modern. All dogmas are traced to Rome: the Law of Nature, as a scheme or source of Law, anterior to or separate from artificial human doctrine, is treated as a chimera, an assumption; the notion of any such scheme pronounced a theory born at Rome, nursed, sublimated, modified, even deteriorated in modern schools of *quasi*-jural philosophy.

Such is but an imperfect index to one of the salient features of this elaborate, original and comprehensive work.

The impressions of the present writer (as the following pages, and this preface evince) do not accord with or yield to the new lights thrown by Dr. Maine upon the subject of this treatise; and he still ventures to adhere to the 'Moral Sense,' to 'Nature's Law,' as the guide, the key, the basis, the inspiration of sound jural philosophy. It may be, that his cramped opportunities of research, of reflection, of mental discipline (results of a quarter of a century of continued exile and professional pre-occupation,) have kept him in error—a laggard in the march of opinion, and the conclusions of sound learning, of philosophic progress. He at any rate, apprehends the excellence (and almost dangerous influence) of commanding scholarship, of a style, terse, polished and effective.

Ancient Law abounds in admirable exposition of the historical progress of jural notions, and of judicature: it is a masterly effort to originate a new (a) school of jurisprudence, to establish historical research and inquiry as the sole, the

(a) Not new, indeed, in the prominent and pervading idea which we have noted, *viz.* futility of the notion of an *a priori*, inherent moral rule or law ("To speak therefore," said Paley, "of one, fixed, immutable, and universal law "of nature, is framing an imaginary scheme without the least foundation in "the nature of things, directly contrary to the present order of the whole "Creation."—and Prof. Falck: "Plusieurs ecrivains modernes, non-seulement re-"jettent l'ancien droit de la nature, mais encore rapportent l'origine de tout "droit uniquement à des faits susceptibles d'être constatés historiquement, savoir "aux lois et aux coutumes." Pellat, trans.);—but, new in the systemized application, the synthetical working out, the undoubting elaboration of that idea, that principle of thought and enquiry, to the tracing and verification of a science of general jurisprudence. This science Dr. Maine finds barely in embryo, in the realm of conjecture (*vide* ch. v), but to be now reclaimed and nurtured by strict observance of the historical method; which method is thus candidly and forcibly developed in the opening chapter of *Ancient Law*:—

"If by any means we can determine the early forms of jural concep-"tions, they will be invaluable to us. These rudimentary ideas are to the "jurist what the primary crusts of the Earth are to the geologist. They "contain, potentially, all the forms in which Law has subsequently exhibited "itself. The haste or the prejudice which has generally refused them all but "the most superficial examination, must bear the blame of the unsatisfac-"tory condition in which we find the science of jurisprudence."

Further on, in his ably elaborated treatise, Dr. Maine exhibits the condemned theory of 'Nature's Law' as a pseudo-historical conception, *scil.*—

"The Roman jurisconsults, in order to account for the improvement of their "jurisprudence by the Prætor, borrowed from Greece the doctrine of a Natural "state of man—a Natural society, anterior to the organisation of common-"wealths governed by positive laws."—"There are some writers on the subject "who attempt to evade the fundamental difficulty by contending that the code "of Nature exists in the future, and is the goal to which all civil laws are "moving, but this is to reverse the assumptions on which the old theory "rested, or rather perhaps to mix together two inconsistent theories. The "tendency to look not to the past but to the future for types of perfection "was brought into the world by Christianity."—"The theory of Natural law "is exclusively Roman."—"Legal science is a Roman creation—"

normal, the one scientific method for the jurist; who is exhorted to devote his energies to the labour of disintering from the dust of ages, of searching, with curious eye, amid the hazy, clouded back-ground of the world's youth, for those "germs out of which" (as Dr. Maine announces) "has "assuredly been unfolded every form of moral restraint which "controls our actions and shapes our conduct at the present "moment." (b)

The present writer would adhere to the (very opposite) sentiments, as truth, expressed in and upheld by the quotations following:

"—la raison prescrit la manière dont on doit agir quand "meme personne n'aurait encore agi de même."

"From review and comparison of the nature of Man as "respecting self, and as respecting society, it will plainly "appear, that—there are as real and the same kind of in- "dications in Human nature, that we were made for society "and to do good to our fellow-creatures, as that we were "intended to take care of our own life and health and pri- "vate good; and that the same objections lie against one of "these assertions, as against the other."

"Have you never heard (continued the Master) of certain "laws that are not written? You mean (said his companion) "such as are in force every where? True (was the rejoinder). "—Did all mankind concur in making them?—Impossible;

(b) pa. 120.

'since all mankind could not assemble in one place, neither "would all have spoken the same language.—Whence, then, do "you suppose we had them? From God, I should imagine; for "the first command every where is, to adore God.—Assuredly, "these things are of God; for when I consider every breach "of these laws as carrying along with it the punishment of "the transgressor, I cannot but allow them to proceed from "a more excellent legislator than is to be found among the "sons of men."

"—there prevails a certain principle of progressive develop-"ment in humanity, in proportion as civilization advances."

"All parts of the Universe are interwoven with each "other;— this World, though comprehending all things, is but "one; as there is one God that pervades all things; — one "Law, the Common Reason of all intelligent creatures; one "truth and perfection of all beings of the same kind and par-"taking of the same rational nature."

"Toutes les legislations positives, tous les droits coutumiers "sont incomplets, et ne fournissent pas des règles pour tous "les cas qui se présentent; c'est un fait qui ne peut être "nié.—Tout droit, précisément parce qu'il est incomplet, "implique donc la supposition tacite qu'il existe, pour tous les "cas non déterminés, non prévus, des principes de droit que "tout le monde peut connaitre et doit observer, qui sont "considérés comme n'ayant pas besoin d'être promulgués, et "qui par cette raison sont passés sous silence dans les lois.

"Quelquefois même cette manière de voir est formellement ex-
"primée par le législateur, et il est ordonné au juge de
"compléter la loi par ses propres réflexions."

"La source du droit est dans la conscience, sa sanction dans
"la société; c'est une garantie de liberté calculée d'après
"l'inspiration de l'équité naturelle et d'après la réalité des
"besoins sociaux; c'est la science des rapports des hommes
"avec les hommes. Elle embrasse tout ce qui est acte
"humain; elle constitue l'harmonie universelle du monde
"moral."

"The Law of Nature, or the natural rule of rectitude, is a
"system of laws promulgated by the Eternal God to the whole
"Human Race, by Reason." (a)

The era of Man is the era of Reason: Reason is and ever has been the sceptre, the charter of Man's dominion, the distinctive symbol of humanity. But, the lessons of Reason (whether collective, of Mankind—or individual) are progressive: Reason has her dawn, her degrees of effulgence; she rises and graduates—in this, essentially differing from her anti-type, Instinct, which is ever at meridian, works on a plane, has neither dawn nor twilight.

In no country in the world is an acquaintance with, a

(a) See this view admirably explained and enlarged upon in Reddie's *Enquiries in the Science of Law*, and especially the fine apostrophe commencing —"There exists no code, or digest, of the law of nature, to the particular "books, titles, or sections of which legislators or jurists can refer, &c." (pa. 83, 2d edit.)

zealous cultivation of whatever may elucidate and make known, may compel an appreciation of juridical principles, *proavia legûm*, more urgently demanded, by the philanthropist, by the earnest statesman, as a public necessity, than in British India. The administration of Law, of Justice, has here, an idiosyncracy, a normal imperfection (most readily admitted by the most able of the administrators) (a), that, as noted by the writer in his former preface, renders some definite familiarity with the philosophy, the general land-marks of Law, a necessity to every class or grade of workman and cultivator in the changeful husbandry of judicial truth, of forensic litigation, —therefore, a prominent subject for attention and efforts of

(a) When the E. I. Co.'s Government in Bengal succeeded, in 1772, to the judicial functions of the Subahdar or Nuwab-Nazim, they committed the error of ignoring Law as a profession, and the necessity of any special training for the judicial office. The subtleties and narrow policy of the *Sheraa* could not be adopted in entirety, and this code was only in Criminal judicature treated as the general Law, where not opposed to our policy or our religion. The niceties of the land-revenue scheme were rather a problem for the political economist than for the jurist: with that scheme was involved and from it had to be extracted or deduced a technical code of landed interests. Besides which, was merely the fluctuating standard of *æquum et bonum* (—even fanciful, as then left, and as, in the main, since carried out; for there has been no guarantee or ground of expectation, that a method would be attained which might rationally be so regarded—), as a rule of judicature, a system of jurisprudence, at once the Statute and the Common Law of the Land. Customs general and local, many personal laws, the Hindu *Sastras* (sometimes as Law, sometimes as a standard of the *æquum*), portions of the Mahommedan civil code (as the Hindu), juridical doubts and difficulties which could not but puzzle experienced jurists—such was the task committed to the gentlemen of the Service who were called to judicial, alternately or even in conjunction with the multifarious other functions of a complicated bureaucratic polity! We may certainly now say (in familiar Roman juridical phrase)—*Dies cedit* 'The dawn is at hand'—'It is the peep o' day.'

Government, both as minister of education and as dispenser of justice. A deep sense of this responsibility has of late years been evinced, and is producing effects, which cannot but stimulate to further efforts, to yet more liberal patronage.

Calcutta, November 1862.

CONTENTS

SECTIONS ; TITLES ; SUB-DIVISIONS

PRINCIPLES AND OUTLINES

OF

GENERAL JURISPRUDENCE.

FIRST SECTION

INTRODUCTORY

JURISPRUDENCE is the science of *jus*, Law. The term Law, as here used, is general, and yet, in a sense, restricted.

Jus may also be rendered, 'the right,' also, 'the rule of right.'

Law, in the widest sense, is the action of a principle of order or uniformity: its existence implies authority and implies restraint: it is a means to an end: it is a mode, a condition, a method of being or of acting. Such are intrinsic incidents or qualities of Law, however the term be applied. For example: the laws of the solar system, the laws of motion, the law of gravitation, the law of chemical affinities, the laws of

animal life, of disease, of decay, of vegetation. Thus, the Universe is a *congeries* of laws, of systems of laws.

"Law hath dominion over all things, over universal mind and matter;
For there are reciprocities of right, which no creature can gainsay;
Unto each was there added by its Maker, in the perfect chain of being,
Dependencies and sustentations, accidents and qualities and powers:
And each must fly forward in the curve, unto which it was forced from the beginning:
Each must attract and repel, or the monarchy of Order is no more.
Laws are essential emanations from the self-poised character of God:
And they radiate from that sun to the circling edges of creation.
Regard now the universe of matter, the substance of visible creation,
Which of old with well observing truth, the Greek hath surnamed Order:
Where is there an atom out of place? or a particle that yieldeth not obedience?
Where is there a fragment that is free? or one thing the equal of another?
The chain is unbroken down to man, and beyond him the links are perfect:
But he standeth solitary sin, a marvel of permitted chaos."

TUPPER

[Propositions from the (connate, though collateral) sciences of Moral and Metaphysical Philosophy, are necessary aids, if not a basis, to the study of Jurisprudence. Such as are here put forward may be alloyed with error, or not approved—if so, they can mislead no reader qualified to study the Philosophy of Law. They are, indeed, offered, rather as hypothetical, than, in their tenor, exclusive. These, however, or substitutes for these, are needed.]

Mankind are endowed with Reason and with Free-will.

To ascertain, how men should act, what are the laws of conduct, to keep in check, to control Free-will—is the province of ethics, also of jurisprudence.

The Will is variable, turning always, as affected by imper-

fect, deviating, capricious influences or secondary laws: these are, perhaps, rather permitted modes or causes of action than laws. Yet, Reason teaches, that, the very uncertainty and what, to our limited intelligence, seems the imperfection of those secondary laws, must be in conformity with a supreme rule and law—that, what is uncertain and imperfect in our eyes, is so only because too vast and intricate, too fine in operation for us to comprehend:

"all chance, direction which thou canst not see."

Those secondary laws are traceable in what writers on the science of morals have called, springs of human action, *scil.* affections, desires, motives.

Man's Reason may well be called,—a divine, distinctive endowment; a charter of mastery and proprietorship.

The distinctive results of Reason are:—

1. Man's religious character, *i. e.* his sense and adoration of Divinity; his desire for religious knowledge;

2. Man's progressive and improving powers, as evinced by architecture, agriculture, all science and art;

3. Man's social nature, as distinguished from the merely gregarious habit seen in unreasoning animals;

4. Man's dominant power, for evil and for good, among his equals or fellow-men, as well as over beings of inferior grade, the irrational creation,—a faculty brought out in relief and instanced in the heroes, the great exemplars, good and bad, of history; *e. g.* Cyrus, Cæsar, Napoleon, Mahommed, Attila.

The material part of Man has within itself the germ (a law, a power) of disease and of decay: one body differs from another, in strength, in soundness; but, each body is alike doomed, sooner or later, to perish, or (more accurately), to cease to be the seat of human life—perhaps slowly, yet surely progressing to complete failure of vitality. Not so with that part of Man which we cannot see or handle, his Soul, his Spirit, his Reason. That part, though developed and made known through Man's bodily life, seems to exist independently; having no germ or inherent principle of dissolution—not fluctuating with, although, in development, affected by, the strength and the weakness, the health and the decay of the body.

But, Reason does not always or infallibly protect from error; albeit, to act immorally or wrongly is, to act unreasonably. Cultivated Reason points out the right road, but often unequally copes with antagonistic forces (—antagonistic to Man's happiness, his "being's end and aim"—), which are among the springs of human action, and rival directors of Man's will.

Perfect cultivation (a)–and use–of Reason must preclude whatever is wrong in action: we have, however, no experience

(a) It is not here intended to exalt Reason, however cultivated, into an infallible guide, much less a means of omniscience. The first step in real knowledge (in, therefore, healthy exercise of Reason), is, humility, a sense of human infirmities. Then, may be attained, that only knowledge which is valuable, for its real and ultimate effects, *viz.* a sense of what is right in action—which course to pursue, as a moral responsible creature. Has any *sane* mind ever been long *ignorant* of the broad distinction between the morally right and the morally wrong, in act?

or record of perfectness in Man. He would not be Man, who had either never known, or who had completely subdued the possibility of inclination to transgress. Both the power and the inclination (as Man is, actually or traditionally,) are essentially human.

The suggestions, the guidance of Reason, in control of the Will, are popularly known as, the voice of Conscience. The intrinsic worth, the correctness of those suggestions, in the mind of each individual, necessarily varies with mental condition, education, habits. Not only do minds differ in strength, in original conformation, in degrees of soundness; but, the mind's health is easily affected, so as to cripple, though, perhaps, never (there being no physical lesion) so as to annihilate Reason and Conscience. The poet Cowper has truly said;

> "Faults in the life breed errors in the brain,
> And these reciprocally those again :
> The mind and conduct mutually imprint,
> And stamp their image in each other's mint."

The choice of good or evil is left to Man; therefore, (so Reason and Man's religious sentiments teach,) upon him rests the responsibility. With the power, he takes all consequences, merit and demerit, of its exercise.

Jurisprudence, Civil Law, juridical rules, have to do only with the social character and action of mankind, the conduct of men in relation to each other. Man is eminently social;

his nature impels him, therefore, to frame and to support rules, without which society cannot be.

All acts of social importance are not within the sphere of Civil Law; *e. g.* benevolence, gratitude, are virtues simply.

Society—Primary; Civil.

The conjugal, parental, filial, fraternal and other strictly family ties and affections—differing (because of Reason) from what is similar or analogous among brute animals—constitute the Primary form of human society.

The dependence and wants of the weaker members of that primary society, give rise to Government, *scil.* the paramount authority of the man, as husband and father, the authority of parents, for nurture and rearing of offspring.

Thus, every human being, from birth, is, of necessity, subject to government, *i. e.* domestic government.

Primary society originates and grows into that union of individuals and of families known as Civil society—a development of man's characteristic social nature, in a truer sense than primary or family society is; inasmuch as, the latter has its type, if not strictly yet nearly, in the irrational animals.

Thus, mankind are divided and subdivided into Civil or Political societies, (from *polis, i. e. civitas,* an organised community, a city) States.

A State is an organised community, having, ostensibly, for common purpose and object, the permanent interest and benefit of all its members—furnishing a social rule, a plan of life, for them and for their descendants.

As the wants, the desires, the temperaments, the tastes of men vary, in different times and in different places, so must the modes of civil society, the character of States vary.

But, each State must have;—1. a defined governing power;—2. rules of social conduct, acknowledged by the entire community, and peculiar to that community, the observance of which is compelled by the governing power of the community.

History, as recording experience, gives no description of mankind before their division into civil or political communities. Bodies of men, at different times and in different places, became civilly separated from the aggregate of mankind (their moral and natural connection with, and relation to all mankind, continuing, of-course); and each body, by and in the course of its separate action and formation, framed or adopted, for its own use and protection, rules of conduct, other than those general rules and laws which (Reason teaches,) apply to all mankind alike, *scil.* the Moral Law, the Law of Nature. By 'other than' is meant, specially adapted to that separate body and section of mankind who adopted and use them—not, that they are opposed to or differ, in spirit or intention, from the Moral or Nature's Law. The one is general, the other particular.

The special or partial rules are called 'Civil Law,' being for *cives*, the members and subjects of a State *(civitas)*.

Analysis and explanation of the plans, methods and rules, by which civil societies are preserved and held together, and

in conformity with which every civil society or State is organized—this is, to enquire of, to unfold the Principles of Jurisprudence.

SECOND SECTION

SANCTIONS

Natural or Moral; Civil.

Breach of the Moral or Natural Law, in other words, disobedience to the Author of that Law, involves penalties, called Sanctions (from *sancire*, to ratify, to make effectual), imposed, directly, by the Law-giver; which sanctions, therefore, are themselves laws of Nature; *scil.* Religious, Moral, Physical—penal consequences or sanctions.

What the Religious sanctions are, Man learns by cultivation of the religious sense implanted in him, the desire for religious knowledge to which his Reason prompts and leads; whence his appreciation of the goodness, and his dread of the wrath of God. The constant appeals, in a rude or inchoate civilization, to supernatural tests of guilt, are a primary and rude development of that religious sense.

The Moral sanctions are various; such as, remorse, loss of sympathy and of society: Physical sanctions are, disease, pain, death.

The inevitable operation of Natural Sanctions co-exists with continued experience and need of them. As before said, Reason leads to knowledge, but Reason does not, certainly or uniformly, preserve from error.

The consequences of obedience are the converse of the penalties of transgression: each class of sequences is but the action of a principle of order, permeating and regulating, invariably, both the moral and the physical world.

Civil Sanctions.

Civil Law, as Moral Law, must have its appropriate penalties or sanctions, Civil Sanctions, imposed and inflicted by the governing Authority.

The penalties of Civil Law are enforced in a manner, and are, in their nature and character, equally intelligible to all; they act, for the most part, on the bodily sense, but, through that sense, upon Man's incorporeal nature—staying and restricting motion of the limbs, exercise of every bodily faculty which makes life enjoyable—straining and torturing the nerves of sensation—depriving of property and *status*—thus, multiplying and varying bodily and mental suffering, even unto death. How such suffering differs from remorse, from loss of sympathy, from all merely Moral sanctions is obvious.

The Civil sanction may be considered as taken, copied from the Physical sanction of Moral Law; differing from it in that the latter is Nature's ordinance, not needing human agency for its infliction, the former, an act of civil, human authority, artificial.

All sanctions of Moral Law co-exist with, they are even strengthened by the sanctions of Civil Law: legal punishment is not without moral effect, and does not lessen remorse for crime.

The general effect and power, the political action of Sanctions, is, upon and through Man's liability, his subjection to fear.

Fear is a powerful and universal spring of human action, varying in intensity with individual temperament, but less fluctuating and partial, in its access and effects, than any other influence on, or mover of the Will. Wherever there is doubt of consequences, there is fear of evil; although may-be, tempered by hope of good.

To what extent, how, men are entitled to inflict and to vary the terror of human sanctions, is a problem for the moral philosopher: it also belongs to the science (or, as some would say, the art), to a definition of the duties and office, of Legislation; which teaches, in detail, what civil laws ought to be—and is, not merely connate with, in principle as well as in object, but an essential part (as a sequel, an offshoot or inference from the fundamental doctrines) of jurisprudence.

Jurisprudence has been frequently, and well described as *leges legûm*, the laws or rules by or according to which civil laws exist and are constructed. (a)

(a) The proposition, that Legislation appertains to Jurisprudence, has been denied; but the contention is (or, the present writer presumes to consider it, as) rather one of words, a logomachy, than a real, significant discussion.

The horrid ingenuities of the Torture; absolute, continued Solitude; Death, except, perhaps, for malicious homicide—these, at least, are questionable sanctions.

THIRD SECTION

GOVERNMENT: SOVEREIGNTY

All government includes a power to make (under varying limitations), and, yet more essentially, to enforce, rules of conduct or laws, both by compulsory prevention and by penalty.

As, in the idea of Law is implied and included restraint; so, in the idea (as a primary incident) of Government is included force, coercion: to govern, is to enforce, to compel. Government, in respect of its other functions and incidents, is subservient to Law; *i. e.* a governor, does and must, at least in theory, obey as well as enforce, rules of order.

'The Queen is the First Subject of The Law'—is an English Constitutional maxim.

Civil Government, called also Sovereignty, has a three-fold operation: its functions, divisions, and modes of action are three:—

1. to make and promulgate laws, Legislature;
2. to determine when and by whom the laws are infringed,

to decide disputes, to impute criminality, to declare the penalties of wrong-doing, Judicature;

3. to wield and use the physical and punitive force of the State, the Executive.

To this, the Executive function, is usually considered to belong, a watchful superintendence and adjustment of the entire political machinery, especially care and dispensing of the State finances, also a right and duty to represent the dignity, as well as the might of the Community, at home, and in intercourse with other nations. Hence, statesmanship, the skill of the politician, of the diplomatist; a Machiavelli, a Todur Mull, a Peel, a Talleyrand.

Those several functions may, all or any, be united or separate. Russia, China, Persia, the Roman empire, are examples of all being united in one man. In the frame or Constitution of the State of Great Britain, each one is, in theory at least, separate, and has independent action; *scil.* the Parliament; the Courts of Justice; the Crown, as represented by a responsible Ministry.

It follows; that Civil societies or States vary from each other, 1. in the distribution and arrangement of the functions of Sovereignty; 2. in the provisions and character of their respective codes of Civil (civilly-coercive) Law.

Thus, Aristotle, in his *Politeia,* explains;

" It is evident that every form of government or adminis-
" tration (for the words are of the same import) must contain

"the supreme power over the whole State, and that this "supreme power must necessarily be in the hands of one "person, or of a few, or of the many; and that, when the "one, the few, or the many direct their policy to the "common good, such States are well governed: but, when the "interest of the one, the few, or the many who are in office, "is alone consulted, a perversion takes place."

Then he goes on to name each sort, *scil.* a Kingdom or Monarchy; an Aristocracy (rule of the best); a Republic or Commonwealth: and the perversions of each he designates, respectively, a Tyranny, an Oligarchy (rule of the few), a Democracy (rule of the populace).

"A Tyranny is, a Monarchy where the good of one man "only is the object of the government; an Oligarchy "considers only the rich; and a Democracy only the poor; "but neither of them have the common good of all in view."

Aristotle adds,

"An Oligarchy and a Democracy differ in this from each "other, namely, in the poverty of those who govern in the "one, and the riches of those who govern in the other; for, "when the Government is in the hands of the rich, be they "few or be they more, it is an Oligarchy; when it is in the "hands of the poor, it is a Democracy. But, as we have "already said, the one will be always few, the other numer-"ous; for few enjoy riches, but all enjoy liberty."

But little need be added to the great Stagyrite's succinct account of Governments, as an *a priori* description: it sends

us at once to History and to the living theatre of passing events.

Great Britain, the Venetian Republic, France, the United States of America, furnish every form and condition of polity.

Heads or branches of Civil Law.

The distribution of power and functions, the *formula* of action in a State, is called, 'The Constitution' of the State.

The relations which the Constitution establishes between the governing body and the people—rules to govern the intercourse of the State with the Subject—rules defining the Constitution itself, the duties and the limits of its several branches—these are, 'Political laws' of a State.

Rules which order the conduct of citizens, members of a Civil society, one towards the other, rules of individual and private intercourse, which describe and redress injuries, are, the 'Private Law' of a State.

Rules which control the conduct, the action, the ordering, as well of the collective body, the State itself, as of individuals towards and in reference to the State, are, the 'Public Law.'

The former, *scil.* Private, is also called, 'Municipal Law' (*municipium,* a town, a civil community).

Again, rules of Law, the breach of which is considered directly to concern and to merit pursuit by the entire Community, the State, as a party injured, *e. g.* rules forbidding to destroy human life, rules forbidding acts which may impede

any function of Government—rules so viewed and followed up, are, the 'Criminal Law' of a State.

The other class of municipal laws, where the sanction is a private remedy and compensation, not a public pursuit or punishment, is, (in a particular, restricted sense,) 'Civil Law.'

An illegal act may be at once a Crime and a Civil wrong: in respect of the former, the public avenger strikes; for the latter, the wronged citizen is compensated. The punished thief should restore his spoil: the punished rioter should remedy what his violence has caused.

FOURTH SECTION

A CIVIL LAW, WHAT—

traced, analysed, applied.

The jurist has to do with the origin, analysis, definitions, composition, meaning, application, differences, of laws, of those rules of conduct and intercourse, which are at once the growth and the cement of Civil society.

The origin of laws is apparent from what has been said; there must be prescribed laws of human conduct, 1st natural and moral; 2nd civil.

So, the analysis, definition and composition of Civil Law, are

severally apparent from the propositions laid down. All laws of conduct are based on or spring out of the one universal, immutable Law, the Law (not for any State, but) for the whole Human Race, the Moral Law. Following, led by Reason to follow the mighty Lawgiver of the Universe, men lay down rules of conduct, which are not part of the general Moral Law, inasmuch as they are not, they are not intended to be, of universal force or application, but are subsidiary and supplemental, an adaptation and carrying out of the spirit of the general code (the one great Law and scheme of right and wrong), to suit the peculiar circumstances of a portion of the Human Race. All however, in all ages, and in all places, are bound by that general code: the particular laws, therefore, deduced from or added to it, cannot, must not (it follows as of course,) infringe any part of that code, but, on the contrary, must harmonize and fall in with, although not of it.

Thus, Civil Law is a development of Moral Law; for, the former is a rule of action which the Moral Law not only warrants, but gives rise to; and breach of a civil law is a breach of duty, a breach of faith, therefore, a breach of the Moral Law: it is, however, a breach which might not be possible (inasmuch as the law itself might not exist,) at other than certain times, in other than certain places, between others than certain men. In respect therefore of their particularity, civil laws are properly said to be different from and beside the Moral Law.

Yet, as has been demonstrated, the first element, the

ground-work, the warrant, of every Civil Law must be, the Moral Law.

But, the command or mandatory part of any Civil Law may contain more than the Moral Law enjoins, *e. g.* a prohibition to kill wild animals *(feræ naturæ)* fit for man's food, as woodcocks, hares, snipe; a prohibition to grow tobacco or opium. The circumstances of a particular State may render such an innovation upon or supplement to the Moral Law properly and morally expedient. This, then, is a 'Conventional or Civil Element' which enters into the composition of Civil laws, generally and as a rule: for, even those laws which sound as mere repetitions of what the Moral Law enjoins, *e. g.*—Slay not a man! Take not that which is another's!—are, strictly, no exceptions. Different codes of Civil Law define differently, according to the conventional opinions or the necessities of each community, what is criminal homicide, and its varying shades: so, 'what is another's' and what is a criminal appropriation of that, are variously viewed and declared in different civil communities.

Annexed to the Conventional Element, and the most distinctive feature of difference in the two codes, of Nature and of Man, (—in this difference all human codes are alike—) is, the 'Arbitrary Sanction,' as already explained.

"Execution," pithily wrote the great English lawyer, Coke, "is the life of the Law."

Execution, Punishment, Penalty, Sentence—these are terms expressive of the vital action and force of Civil Law: when they cease to have meaning or effect, Law has no existence, as Civil Law: it is, then, but a precept, a dogmatical injunction, and absorbed, if a righteous injunction, in the Moral Law. (a)

"Justice," says the Hindu code, "was created by Brahma "under the form of Punishment."

So then, every civil law is composed of a Mandate and a Sanction; the mandate or mandatory part being composed of a Moral Element and a Conventional Element.

This last may be also called, the civil, the artificial, the mutable, the local, the arbitrary, the human—element, incident or quality; each epithet indicating a characteristic not included in the indispensable, universal or moral element.

The nature of Man necessarily determines the nature

(a) Occasionally, but seldom, a civil law (or, a rule promulgated as such,) invites and persuades, instead of threatening, *e. g.* bounties, bonuses, guarantee of privileges. But, this exceptional legislation is no exception to the characteristic of Civil-law sanctions, as above described; nor can that be a positive mandate or a law, properly and technically, which does not prohibit and compel, but invites only and induces by a promise. The offer of reward implies, *ex vi termini*, a lawful alternative; it advances a policy, rather than indicates a law. Promise of reward and threat of pain, have been by some writers put in the same category, as sanctions. This, for the reason given, is considered an error. Obedience to the precept, acceptance of the offer, creates a right; as any conventional contract might do.

and application of Law, as a civil rule and standard of human conduct.

The motive, subject, scope, operation of the rule must correspond with, be within Man's sphere of action —a dogma thus explained by the French jurist, Domat:

"We cannot take a more simple and surer way for disco-"vering the first principles of laws, than by supposing two "prime truths, which are only bare definitions. One is, that "—the Laws of Man are nothing else but the rules of his "conduct—and the other, that—the said conduct is nothing "else but the steps which a man makes towards his end."

To argue, then, and explain the end of Man, the purpose of Man's existence, is, to lay bare the foundations, to develop the structure, to illustrate the necessity and application of Law.

In Man's steps towards his end, we know must be found every intermediate object and aim which consist with the purpose and end of Man's being: it is the observation of an English moralist of the 17th century, that, whatever is directed in the shortest way to that end, may be called 'right,' as a right line is the shortest of all.

To associate and to form communities, to erect powers and principalities, to organise schemes of political and social action, to possess, to enjoy, to improve, to explore, to discover, to speculate—such are human aims and occupations, all tending to the end: for they are the natural results and promptings of Man's wants or of Man's Reason; that Reason how-

ever being, as before noted, influenced, clouded, impeded, by a secondary power, Man's Will—itself but a result of motive forces (*supra, p.* 3).

Association, the union, concord of intentions, of aims—must, in action or operation, restrain something of the will of each individual in the union: hence, Civil Law itself has been defined, 'the deliberate reason of all, governing the occasional will of each.' What each one is to have, not to have, to do, to refrain from, must be ascertained. To every grade and form of association, this rule and necessity applies and inherently belongs.

Political associations are formed gradually and variously, discordant wills give way and combine, uniform action is authoritatively established, by degrees; that uniformity is Civil Law, the result of collective sentiments, habits, manners—of convenience, of circumstances, in continued association.

Liberty: Equality.

Subjection to Law indicates restraint and coercion; *scil.* compulsory progress (notwithstanding and in contrast with variable and varying wills)—a restraint and coercive power which is supreme and single, admitting of no rival, no interference. Necessarily therefore, every system of Law enjoins and defines restrictions, circumscribes the freedom of action of members of the community, so as to preserve

and protect the *common* weal. Beyond and beside those injunctions, every member is free to act as he wills, *i. e.* without risk of Civil-Law sanctions.

'Liberty,' 'Freedom,' are terms expressive of Man's power to exercise his faculties, to think, to speak, to do, as he wills—a power which (it follows from what is premised,) can never be unlimited: the ideal action of Man's will is, perhaps, without limit; but, it should (in theory, therefore, it does, and must) act in conformity with the mandates, and influenced by the sanctions, first, of Moral Law, secondly, of Civil Law. He then is free, he enjoys full liberty, who knows no *other* restraint than Law and Morality. *(a)* Hence, the epigrammatic truth of the Roman philosopher and orator,—

'For this it is, we are servants of the Law, that we may be free men.'

Law confers, as well as secures freedom of action. *(b)*

(a) In this account of Liberty, no provision is made for the unrighteousness of any law, such as *may* excuse or, in plain obedience to a paramount rule, even warrant disobedience. We must assume Civil Law to be in consonance with Moral Law. A law, which the subject can have any righteous option about obeying, is too exceptional to be here noticed: it is a political dilemma.

There is another, and perhaps the most usual, sense or application of the word 'liberty,' in which sense or use, it has ever been a very tocsin of dispute and strife, and in which it admits not of definition, *viz.* the position to which the Subject, under every or any Government, is entitled, as respects freedom of speech and of action, as respects also, voice, power or share in every or any function of Government. This is a problem of Legislation, and of speculative politics.

(b) Bentham, commenting on the 2nd Article of the French Declaration of Rights, of 1791, says:—

"We know what it is for men to live without government, for we see instances of

Each one's liberty is,—according to the standard of Law, of justice,—such freedom of action and of speech, as gives no hindrance or impediment to, but leaves untouched, a like or equal freedom in every other one.

Equality, in jurisprudence, in political science, means—the equal, unvarying protection of Law, to which each one is entitled. Men have equal rights, but to unequal things. The station, duties, possessions, condition, success, of individuals necessarily differ—a necessity as real and as rational, as the physical differences of complexion, of stature, of temperament. What rightfully belongs to each, is equally secured to each, by Law.

"such a way of life—we see it in many savage nations, or rather races of mankind; "for instance, among the savages of N. S. Wales, whose way of living is so well "known to us: no habit of obedience, and thence no government—no government, "and thence no laws—no laws, and thence no such things as rights—no security— "no property:—liberty, as against regular control, the control of laws and govern- "ment—perfect; but as against all irregular control, the mandates of stronger "individuals, none."

Bentham ignored 'natural rights,' even in the constitution of the Family, except as a mere consequence or inference from brutal *i. e.* physical force; therefore, he ignored domestic government, as 'regular:' this singularity (more formal than real) does not affect the force and truth of his illustration of 'liberty' in the absence of civil sanctions.

FIFTH SECTION

RIGHTS: OBLIGATION

Whatsoever a man may claim protection for, to be protected in, by appeal to Law and to the sanctions of Law, is, his Right—lawfully his own, under the guarantee of Law; *e. g.* Life, Liberty (as above defined), Property.

"Private Right lies under the protection of Public laws; "for Law guards the people, and Magistrates guard the "laws." BACON

The respect, restraint, conduct, imposed, by Law, on every one, with regard or in relation to every other one's Right, is, in each case, an Obligation.

The Obligations of Moral Law are called, as such, emphatically, Duties—being what is due to Reason, to Nature, to God: obedience to Civil Law, is, therefore, a Duty.

The word, duty, is also used generally, as a synonyme of obligation, *scil.* moral duties, legal duties.

Definition of Right necessarily enters into every enactment or declaration of laws; inasmuch as, every law treats of, is directed against the infraction of a Right, *scil.* a civil wrong, and, in so doing, defines and creates the legal Right—determining, within the dominion and scope of that

law, and as the legislative judgment, the national or public conscience there wills, what is right and what is wrong.

As then, every law either expressly creates, declares, defines or implies a Right, a something to be protected, guaranteed; enquiry, what are or may be Rights, under the Law, Jural Rights, essentially belongs to jurisprudence.

Remedy.

This Right is a consequence of every Private Civil Wrong; inasmuch as, compensation for, reparation of the loss occasioned by wrong and injury, is every man's Right.

This Right may be defined—Restoration, actually or virtually, to the *status quo*, the state of things existing before (or rather, which would have been but for) the wrong done, as far as possible. To enforce, confer and protect, enjoyment, fulfilment, of every such Right, Civil Law provides a Remedy—a method of pursuing the wrong-doer, of settling, of obtaining the Right. Hence, the Law maxim, 'Every Right has a Remedy;' Right and Remedy being correlative terms.

'When a Statute (in the words of an English Judge, Maule,) gives a Right, then, although in express terms it has not given a Remedy, the Remedy which, by Law, is properly applicable to that Right, follows as an incident.' (a)

(a) Hence, practical law, the essential knowledge of a legist or law-practitioner, has come to be thought and treated as little more than a *catalogue raisonné* of remedies. One so qualified, is a law-druggist, in contrast with the jurist or physician.

Breach of some law, infringement of some civil Right necessarily precedes exercise or defined existence of the 'right of remedy,' which, until such breach, is merely potential and contingent. But, it is a Right that accompanies or supplements every other civil Right. Remedy is the road, the means of attaining to, the test of that particular Sanction, which the Right, the rule of Law violated demands. Pursuit of remedy leads, in the first instance, to a new, defined adjudicated Right and legal claim, *e. g.* damages—these being unpaid, the sanction, *e. g.* imprisonment, follows. (a)

Security of Person.

Every system of Civil Law protects the Person, the Body, all that constitutes 'self.' Detriment to, interference with, active assumption of power over the life, the physical

(*a*) It may seem inconsistent or illogical to class as a Right, what, it must be admitted, is a sequel, a mode of realising, a vindication of every Right, is therefore merely adjective, having no independent or substantive existence. Yet, this it is which gives value and reality to every Right, secures each correlative Obligation, comes into existence in substitution of something lost—which cannot be said to be included, valuable and material as it is, in any description of original Rights, personal or external. It is therefore (as is submitted,) a paramount, a distinct, if not a substantive Right, in itself—essentially Civil and artificial of-course; an alternative enjoyment (when any Right or fruition of Right is lost or invaded), just as Sanction is the alternative to obedience of the Law's mandate. The alternative is a distinct command, an infliction; so, remedy, the alternative, is distinctly given, as a Right.

The very first of the Decemvirate laws declares or confirms this Right, in the rule of compulsory attendance before the dispenser of the law, the *vocatio in jus*. The Obligation from delict, *i. e.* created by Wrong (*ex ipso maleficio*), found in the Roman system and in treatises of jurisprudence, is, after all, but the 'right of remedy.'

or the mental condition of a fellow man is, universally, a wrong, infraction of Right, a breach of Obligation, moral and civil.

Here therefore, will range; wounding, striking, unauthorised personal trespass or restraint of any sort, acts directly causing damage to health of mind or of body, illegal interference with mental or bodily action—all are infringements of personal integrity and security, the first of substantive Rights.

The British Indian Code (para. 298) protects the mental action of all classes of subjects, whether Christian, Hindu, Mahommedan, Seikh, or of any other creed or denomination whatever, in free exercise and expression of religious convictions, by punishing taunt or ridicule of religious feelings.

By such treatment of intolerant and rude disregard of religious opinion, the Civil Right to independent thought, in a wide and most important range of mental action, as a personal Right, is recognised and vindicated. (a)

All laws imposing restrictions upon expression or communication of thought (*e. g.* censorship of the Press) range under

(*a*) Thus evincing an anxious sense (justified by experience) of risks, as of need for unusual State interference and protection; the risks and the need alike arising out of a highly exceptional and all but incompatible commingling of races in one political body. How does such a law contrast with the ignorant despotism, which inflicts penal disabilities on all whose religious mental action, however genuine and conscientious, is not in harmony with that of their equally frail fellow mortals who happen to rule the State! For a repetition of this class of statutes, the day has happily passed, with scarcely a possibility of return.

this head; they define *pro tanto* the Subject's personal liberty and immunity; they also typify the views or the fears of the governing body.

Self-Defence; Resistance, Coercion.

Nor, is the protection confined to applying remedies and sanctions, in their ordinary acceptation. The Law should prevent and resist evil, as well as repair and punish: hence, a threat, accompanied, evidenced by attempt or gesture of injury, itself confers a Right adapted to the necessity of the case. Self-defence is that Right, as well as the expression of that necessity. The defender is *ex necessitate* the instrument of the Law. The imminent danger of the attempt, the inchoate act of violence, release the threatened citizen from his Obligation, in this instance, to respect the personal Right of another—or, the occasion may be treated as an exception to, a qualification of that Right. The shield of immunity from personal violence, given by Law, is not to be converted into a weapon of violence, nor a means to aid and promote violence; the attempt so to use it cancels, *pro hâc vice*, the violator's general Right: the shield (as an *ægis* of Law) drops, vanishes.

The same rule and reasoning applies to protection of any Right, *e. g.* Possession, wherever a similar necessity, *viz.* for the threatened party to act as an instrument of the Law, exists; the emergency precluding recourse to officers of the Law.

As Contract creates an occasional law and obligation, *viz.* to observe the terms of the contract (as to which *infra*); so, violence or attempt of violence creates, gives birth to a new Right in the victim, *viz.* of resistance, coercive repulsion, self-defence—a Right enforced, not through the active interference of Law, but by an exceptional permission, by withdrawal of a general prohibition.

These are not only juridical rules, but a part of the Natural Law; contradiction of which would be an act of oppression, not of Reason: for, State-coercion is but a civil substitute of the inherent natural Right, Self-protection.

The aggression which warrants infringement of, trespass upon another's personal security, is not confined to aggression upon the person of the trespasser himself. Right of resistance must be co-extensive with the duty, the obligation and the Right of protection: wherever Law declares the Right or imposes the obligation, all acts and power necessary for efficient exercise and performance thereof are delegated, as of-course.

Moreover, wherever the public weal, the general peace of the community, *e.g.* prevention of heinous crime, calls for private interference; there, such violence, such vindicatory coercion as the occasion morally justifies, comes under this head of Right.

The English Common Law has supported the Right of protective coercion in defence of a child, a relative, a

wife, a husband, a servant, an apprentice, a neighbour, a friend.

Status; social, political.

In addition to the class of simple and material Rights of the Person, each member of a civil community has a *status* (standing, position) and condition, *i. e.* a social place and rank, according to which his civil Rights, duties, conduct, are to be estimated; which status involves and confers distinct civil significance and Rights: he is, the head of a family, a son dependent on his father, an orphan under guardianship of the State or its delegates; he is, a magistrate, a soldier, a priest; he is, a trader, a lawyer, an artisan; he is, may-be, free from office, or calling, from the cares of family, or particular dependence, merely owing allegiance to, and claiming protection, in the enjoyment of his property and civil rights, from the State: however that be, he yet has a place assigned to him in the roll of members, according to his birth, to his wealth, to his mode of life, to his civil and social accidents.

These Rights of *status* necessarily vary and multiply with the social, commercial, official, artificial relations, created or recognised by each system; disregard of which are, in that system, Civil Personal Wrongs; *e. g.* depriving a father of his child, a husband of his wife; injuring either father or husband through personal injury to the child or wife; illegally and maliciously alienating custom-

ers from a tradesman, clients or patients from a lawyer or medical practitioner.

With respect to the *status*, the relative Rights, created by State-offices, as of judge, magistrate, military commander, &c; interference with those Rights—*i. e.* with execution of the duties assigned to the office which they represent—although it must involve personal indignity and cause for individual complaint, is an affair of State, a crime; since, the primary and most material injury is, to the Public, the Nation, whose service and welfare is thereby marred or trifled with. But, the officer may, by some fraud or machination, lose his office, or his hold upon the confidence of the Public, the estimation of his superiors. Here would be private and personal wrong or damage, by means, through the channel of his official *status*.

Most frequently, in such cases, *status* and position is rather a criterion of the amount of damage done, of loss to be compensated, than a distinct class of injury; inasmuch as the wrong complained of is a violation of a personal or absolute, of a distinct, as well as of an artificial or relative, Right; *e. g.* defamation, illegal deprivation of profits or income.

Repute; *Amour-propre*, Self-respect.

It is obvious, that, to lessen, to lower, without warrant of Law, the reputation, character, existimation of a citizen,

among his fellows; must often be a serious social and civil grievance. Hence, laws of defamation, slander, libel.

Good-Name is a moral reward, therefore a moral right, and, in one shape or another, always vindicated by Civil Law.

Moreover, to make an insulting speech, may—and that, merely in respect of personal dishonour, of wounded feelings,—infringe a Civil Right: for, the sentiments, the manners, the civil content of that people, may require so nice an estimate of personal immunity. In the Law of the Hindus:—

"If any give abusive words to a deformed or diseased per-
"son, whether the words be true or untrue or in the form of
"irony, he shall be fined." YAJNAVALKYA.

The Indian Code (para. 509) treats as an intrinsic Civil Right in British India, the mental modesty and the seclusion of Woman, any violation of which is a Crime.

The student of History knows how insults have been, Law approving, wiped out with blood. The historian of Sweden (Geijer) quotes an old law of those famous Northern tribes,—"that, whosoever upbraided another, as not being,
"'a man's match nor a man in his heart,' should render
"himself to do battle with the man he had insulted, at a
"spot where three ways met. If the person against whom
"the words had been spoken came not to the meeting, it
"is said, then must he needs be such a one as he

"hath been called, and can never again bear valid testi-"mony, nor take oath. If the person who spoke the words "came not, he was to be publicly proclaimed infamous "(*niding*), and a memorial of the fact must be erected at "the spot."

To upbraid one who had an insult, personal or hereditary, to avenge, was an offence punishable by the laws of Genoa.

Family Rights.

It is intended to class under this head, only Rights of the immediate components of the Family *inter se*, over the persons and actions of each other; with the corresponding reciprocal obligations. In origin, in their general character, this class of Rights and Obligations are moral and universal (*scil.* of husband, parent, child); but Civil Law often modifies, extends, limits and arranges them (as in the case of Property) somewhat arbitrarily. They are considered in a separate section.

Property.

To Have, to Possess, to Use—these are terms indicative of Property, a natural institution, one of primary society, found in, because essential to, every stage of society; however improved, modified, analysed and built upon by civil laws.

In the simplest association, if mankind but co-existed without associating, something or the use of something must be

an individual's own, entirely or for a time: this is necessary to any enjoyment of life, to life itself—and this, is Property.

Analysis of the inherent laws of association (*supra*, *p.* 20) sufficiently accounts for institution of Property; seeing that men are associated in order to enjoy the common birth-right of mankind, the Earth and the things of Earth. It may indeed be maintained, that, the Author of the Universe, by giving that birth-right and heritage in common, decreed and compelled, *quoad hoc* at least, association.

What is one's own, the interference of every other is excluded from: Exclusion is, then, the generic, the fundamental idea in Property.

Its necessity being established (in which cause and ground, universal assent is included; for, 'necessity' expresses an over-ruling motive, an all-prevailing influence and spring of action); what is the medium or the criterion of appropriation, of Property? Nature and Reason answer, —occupation, labour. By 'occupation' (a) is meant, the act of a first taker, the effort to appropriate; which act and effort, if continuous and sustained (as must be assumed), include 'labour.' Variety, modes, divisions, disposal of proprietary Right,—these depend on systems of Civil Law; *e. g.* feudal, zemindary, copy-hold, labour-rights, in land.

(*a*) The etymology of this word may be safely taken from classical Roman literature, *scil; sopor occupat artus, pallor occupat ora, fama occupat aures, fortiter occupa portum, ea verba occupasset Ennius* ('first employed' or 'made use of, *Cic*).

Eastern codes have expressly recognized labour, as a basis of Property :—

"Sages, who know former times—pronounce cultivated "land to be the property of him who cut away the wood, or "who cleared and tilled it." MANU

"He who brings into life land which was dead, he is the "owner thereof." (Extract from the *Sheraa*)

Grotius says; "A thing may become our property by "acquisition, original or derivative. Original acquisition "formerly, when the Human Race could meet together "and agree, might be made by division; at present it is "only made by occupation."—and, "—things became pro-"perty, not by any act of the mind alone; for one party "could not know what another party wished to have for "his own, so as to abstain from that; and several parties "might wish for the same thing; but by a certain fact, "either express, as by division, or tacit, as by occu-"pation: for as soon as community was given up, and "while division was not instituted, it must be supposed "to have been a matter of agreement among all, that "what each had occupied he should have as his own."

Original acquisition of Property is, to the jurist, a mere speculative enquiry; inasmuch as every system of civil laws must apply positive rules to determine the ownership of all *res* within their dominion; even those seemingly derelict. If the unappropriated subject of Property, *e. g.* land, be *extra*

the territorial sovereignty of any State; the first efficient occupant, by his acts of occupation, necessarily brings the new acquisition under dominion of the laws of that State and Sovereign to whom he owes allegiance, and those laws clothe the new territory with a definite character and quality, as a subject of Property.

For, the political status of the acquirer invests him with a representative character, whether he will or no; *nemo potest exuere patriam:* he carries that status with him, into all lands; nor can he acquire, any where, any Rights, but in subordination to the Laws of that Society of which he is a unit. (a)

Among the ancient Romans, Property *(mancipium, dominium ex jure Quiritium)* had a very technical, or rather, a political definition and character; subjects of property were arbitrarily classed and distinguished; modes of transferring and of modifying proprietary interests, were cumbrous and curiously artificial. With the advance or changes of Roman manners and opinion, Property and its incidents underwent concurrent variations, characteristic of those changes. (b)

(a) This general rule is consistent with occasional and exceptional results of emigration, and with affranchisement (constrained or voluntary) of a dependency.

(b) *Mancipium, manus, potestas*—these terms, which are tokens and indices of Civil Right in the primitive Roman polity, assert the military—rather prœdatory—the *vi et armis* basis on which that polity was built. The science of their jurisprudence, the devices of their procedure, the philosophic reasoning of their jurists, all recognise and conform to that basis; which admitted of, and received an enlightened superstructure.

Among that ancient, numerous and hardy people, the Suevi, as we learn from an eye-witness, Cæsar, in his Gallic campaigns, individual property in land was unknown, because disregarded: "*privati ac separati agri apud eos* "*nihil est.*" A depôt only tarried at home, and provided for the wants of all, by culture of the fields; whilst the bulk of the nation sallied forth to the more congenial pursuit of arms. And, of the Germans, the same author says; "—nor "has any one of them any defined or appropriated land; but "the magistrates and chiefs assign yearly to the several "tribes and families, who meet together for that purpose, as "much land, and in such locality, as they think fit, and "compel them, after a year, to change their holdings."

To the same effect wrote Tacitus, in his treatise of the manners of the Germans.

How different the race, of whom an officially accredited traveller and historian, Colonel Tod, records :—"The love of "Country and the passion for possessing land are strong "throughout Rajpootana: while there is a hope of existence, "the cultivator clings to the *bapota* [patrimony], and in "Harouti this *amor patriæ* is so invincible, that, to use "their homely phrase, 'he would rather fill his *pait* "[belly] in slavery there, than live in luxury abroad'—"!

The same writer relates, with reference to the land-occupant or ryot, in one district,—"If in exile, from whatever "cause, he can assign his share to trustees; and the more "strongly to mark his inalienable right in such a case, the

" trustees reserve on his account two seers on every maund " of produce, which is emphatically termed, *huk bapatá* " *cá bhom, i. e.* the dues of the patrimonial soil."

A resident and traveller among the tribes of Southern Africa assures us, (a) of the Basutos, and others (primitive agricultural and non-nomadic peoples), that they have a strong sentiment of affection for their lands, and cannot be induced to barter them with the colonists. The author proceeds:—

"The sale or transfer of land is unknown among these " people. The country is understood to belong to the whole " community, and no one has a right to dispose of the soil " from which he derives his support. The sovereign chiefs " assign to their vassals the parts they are to occupy; and " these latter grant to every father of a family a portion of " arable land proportionate to his wants. The land thus " granted is insured to the cultivator as long as he does not " change his locality. If he goes to settle elsewhere, he must " restore the fields to the chief under whom he holds them, " in order that the latter may dispose of them to some other " person."

The digression just made from the general plan of this treatise, *viz.* delineation of principles, is, in order to explain and vindicate the writer's view of what the general juris-

(a) 'The Basutos, or twenty-three years in South Africa' by the Rev. E. Casalis, 1861.

prudence of Property is, as distinguished from the history of its development in the several doctrines, habits and phantasies of nations, when dealing with Property and material Rights. Variable and numerous as the peals, the harmonies and discords, which may be rung upon ranges or octaves of bells (illustrative of the laws and modulation of sound), are the modes, the changes, the application, under which varying circumstances exhibit—no less in the primitive civilizations still being discovered oı becoming familiar to us, than in the past history of Mankind—the simple principles, the bases of General Jurisprudence. Whether this or that community, whether the earliest organised political bodies, whether the majority, have or not appropriated their portions of the estate of Mankind, or any subjects of Property whatever, collectively, in groups, or individually, whether in simple and absolute dominion, or temporarily, for unlimited use or as partial usufructuaries, —whether with as little ceremony and method as do the feathered architects who, with unconscious and unerring skill, select sites for nest-building, the bees for their hive, the beavers for their elaborate and city-like structures; or, whether with Quirital formalities—are alternatives, questions and differences, not indicating any variation, or new principle of jurisprudence, but, all carrying out the simplest principles, each and all illustrating the same inevitable truths, the philosophy of the Law of Property. The variations of circumstance and of rule, constituting

the idiosyncrasy of each people's ways, wants and wishes, are phenomena, but not of the science of Law, or General Jurisprudence: civil laws are a concrete result of the principles of that science combined with and acting upon such idiosyncrasy. (a)

Accession.

Property, besides its use and significance as a sharing, an apportionment, a plan for enjoyment of the estate of the Human Species, this Earth and the spontaneous gifts of Nature, applies also to the product of Labour, (not the labour of occupation and appropriation merely, but) that which is created, or at least fabricated by Man, the fruit of Industry. Here is an indisputable basis of Property, of exclusion, of preference in enjoyment. Difficulty, however, may occur with reference to the material upon which the industry, the skill is employed; *e. g.* agriculture and horticulture, architectural structures, sculpture, painting. If the labour and skill which have produced the cultured field or the work of art, be the property of A, but he has, wilfully or unwittingly, worked upon the soil, the marble, the canvas of B; there is a confusion of Rights: these must be apportioned and disentangled by positive conventional rules of Civil Law. The dilemma has given occasion to much casuistical ingenuity; *e. g.*

(*a*) The general definition or idea of what Man has to enjoy is variously expressed, *e. g.* the Mahommedan *mâl*, the Roman *res*, may and must alike be rendered by the French *choses*, *biens*, and by the English 'property'; yet, they widely differ in extent of description.

"Seeing a master has a right to exclude all from the use of
"what is his, he has a right certainly to hinder any thing from
"being joined to what is his against his will. Wherefore, since
"what is added to any thing of ours, either renders it useless,
"or at least worse, or renders it more valuable and better, be-
"cause he who renders our goods worse hurts us; the conse-
"quence is that he who has rendered our goods either useless
"or worse by an industrial accession, is obliged, taking the
"spoilt goods, to repair our damage; and if he did it by de-
"ceit, and with evil intention, he is likewise liable to punish-
"ment.

"But, if our goods are rendered better and more valuable
"by any artificial accession, then there is a great difference
"when the two things can be separated without any consider-
"able loss, and when they cannot. In the former case, since
"the master of each part hath a right to exclude all others
"from the use of what belongs to him; but that cannot now
"be done otherwise than by separating the two things; the
"consequence is, that, in this case, the things are to be imme-
"diately separated, and to each is to be restored his own part.
"But, in the other case, the joined things ought to be adjudged
"to one or other of the two, the other being condemned to
"pay the value of what is not his, to the owner who is thus
"deprived of it; and, if there be any knavery in the matter,
"punishment is deserved." HEINECCIUS, *Universal law* (a)

(a) In *The Digest*: 'when one out of another's materials fashions something for himself; Nerva and Proculus are of opinion, that the fashioner is the owner,

All such cases come under the juridical head, Accession, which includes every kind of addition to or improvement of Property, whether Natural, as, alluvial accretions, or Industrial, just referred to. Such cases, as observed, must be provided for by the Civil Law of each State. (a)

Res Communes; Res Publicæ

It is obvious, that many things which are the heritage of Mankind, which the bounty of Nature has spread and ever preserves for Man's sustenance and enjoyment, are incapable of specific appropriation.

For the same cause that many things, as, land for habitation or cultivation, food for consumption, must be divided and entirely appropriated, to be of use to, to be available by men, *viz.* that no other mode will answer the end—for the same cause it is, that the Air we breathe, the Sea, the

inasmuch as that which is fashioned, had not appertained to any one. Sabinus and Cassius think it more carrying out Nature's rule, that he who was owner of the material be also owner of what is fashioned from that material, inasmuch as without the material nothing could have been fashioned——But the opinion of right-thinkers is between those two, *viz.* if what is fashioned can be reduced again to the mere material, then what Sabinus and Cassius hold is the more correct doctrine; if it be not capable of such reduction, then the doctrine of Nerva and Proculus is more correct—'

(a) 'The Law of the xii Tables did not permit stolen materials joined to [so as to be identified with] dwellings or to vines to be detached, nor to be claimed [by the proprietor of the stolen materials]; which was a provident law, lest under such pretext edifices be destroyed or cultivation interfered with. But the Law gives an action of double damage against him who is convicted of having [illegally] joined them together.' (*The Digest*). The prohibition to separate, was, obviously, a city conservancy law, in the interest of the Public, not of the individual.

Sea-coasts, are obviously impossible of rationally exclusive appropriation; inasmuch as their very use, their advantage implies, that they are *general and common at all times to all Mankind:* which condition, itself specifies and defines the entire class of such things. Were it otherwise, the liberty to appropriate (where physically possible) in such cases, once admitted, the appropriators must lose much more in what they are excluded from, in the deprivation consequent upon such liberty, than their own appropriation could possibly compensate. This truth is ratified by universal consent.

Just so, certain edifices, roads, &c. within the territorial limits of each particular State, are and must be, *common and public to all its subjects; e. g.* buildings for public worship, for public entertainment, bridges, canals. (a)

Good-Faith, Truth.

These terms describe a substantive Right of social Man; a Right so comprehensive, that it is an ingredient of every juridical Right, and may be considered, from its universality and paramount significance, a distinct branch of the science of Jurisprudence, rather than the name of a Right, a protected claim: yet this it is, and more. As a

(a) The *res publicæ* of the Roman system included but a portion of what is intended to be here classed; the distinction with them having reference to local and national views. Whatever, for the public benefit, is withdrawn from commerce, from individual appropriation, is, in a general and purely juridical sense, public.

principle of social action, it was described by the profound and eloquent Burke; "—the Faith, which holds "the Moral elements of the World together." The subject is treated of in a separate section.

Summary and Classification of Rights.

Thus, legal, jural Rights are, either—1. Rights of or in the Person, or, 2. Rights of or to Property.

Among the first class of Rights, we may include, Reputation, Good-Faith; among the second, Services (property in another's labour), Contracts (promised benefits). In this view, one, and the most important head of Personal Rights are inherent, not created though supported by Civil Law: privileges of status, of office, are artificial and inferior Personal Rights. The majority of Proprietary Rights (not all, as explained,) are, obviously, creatures of Civil Law.

Rights are also classed as, Personal Rights and Real Rights; Personal here signifying, not merely, relating to the person of the claimant (as, logically, every imaginable Right must be), but which bind persons only, a particular person or particular persons, not all persons, and which cannot be enforced against the subject-matter of Property (*res*) without regard to persons (except as mixed up with and attached to that subject-matter); the latter class of Rights being, Real.

In Real Rights, the Right is represented by and in the *res*; in Personal Rights, the Right is represented by, and

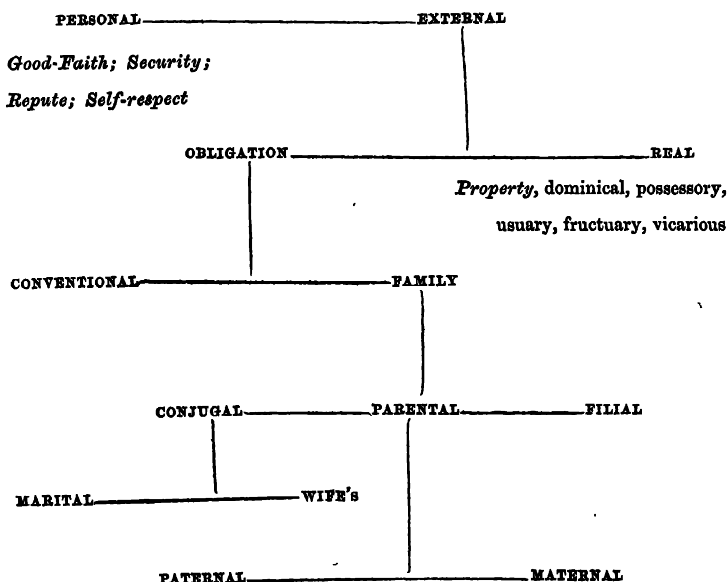
is in the identity, the will, the intent, the conscience of the person obliged, whose act is needed, in the eye of the Law, to give enjoyment of the Right. Every such Right is, a claim on a person or persons to pursue a particular conduct—nothing more: the sanction, in support of it, is directed to that person, to compel, to coerce, to punish him. But—you have acquired the Property in, the possessory Right to a house, to land, to a horse, &c.—you have, therefore, a general Right to exclude—your Right is enforceable against all the world; it does not link or connect you with any specified person; no one person more than another is bound to you in respect of it, as a real and material Right—for, if any such specific tie exist, it is a several Right, although supporting, yet outside and independent of your Right in the thing itself, your *jus in re.*

But, a Right to personal safety, to personal liberty, to reputation, are not claims on particular persons: they are independent Rights, against all; and yet not real. It is obvious, therefore, that, the division, personal and real, as last explained, does not include those inherent Rights, nor mere civil Rights of the person—that it is but a subdivision of Rights of Property, *i. e.* of or in what is external to the person of him who claims the Right; being the second class or general division of Rights, as first explained. We have, then; 1. Rights of the person, merely —Personal Rights; 2. External Rights, *viz.* 2*a.* claims

on persons, *i. e.* Conventional and Family Obligations; 2*b*. claims on or to things—Real Rights.

Here, 'person' and 'personal' have a double signification; alluding, in the first division, to the person of the Right-*holder*, the actor (when he wills,) in maintenance of the Right; alluding, in the second division, to a person obliged, the Right-*bound*, as he may be called, inasmuch as, against him, the Right is enforceable, willy-nilly; he is the patient—passive, in maintenance of the Right.

Table of Jural or Civil Rights. (a)



(a) original and substantive.

Grotius thus describes a jural claim or Right:—

"It includes, Power; whether over one's self, which is Li-"berty; or over another, which is Authority, for example, Pa-"ternal, Dominical (that of a master over a servant); Owner-"ship, whether full, as of Property, or less full, as of Compact. "Pledge, Credit, to which corresponds Debt on the other "side."

SIXTH SECTION

POSSESSION, PRESCRIPTION, TITLE

In considering the cause, beginning, or modes of Property, the mind naturally lights upon Possession, as the earliest and most essential condition, natural as well as civil. What a man does not possess, he has not. But then, the possession of juridical science must be something differing from, something more than mere holding, physical detention: such possession must indicate some Right or pretence of Right; and therefore it must be rational, an act of Reason, or, at least, of rational volition, not unconscious, accidental, unmeaning, without object, nor a mere physical handling.

The etymology of *possessio, possidere,* has been asserted from *positio,* placing; as though the foot were planted on the

subject possessed, or, as signifying that the subject was necessarily in juxta-position with the person of the possessor (a): another conjecture derives it from *posse*, indicating the power conferred by possession.

As all Rights and laws declaring Rights, are relative, for all concern the conduct of others towards or in relation to the Right-holders; so, in particular, juridical possession may exist against one (who is under an Obligation to recognise and respect it, as a Right), and not against another, whose servant or agent or representative the physical holder, the vicarious or ostensible possessor may be.

Physical possession or holding may be contentious and contestable, juridically, in a two-fold sense.

If a wrongful holder do not set up right, but might; if he ignore or set at nought any civil appropriation having been made of what he holds; asserting his own will or desire merely, for a cause of possession—his only relation to the thing held, consequently to *bonâ fide* claimants of the Right to possess it, is, as violator of the Law; and he is pursuable as such.

But, if the holder think he have a juridical claim, *scil.* a Right, of any kind, to hold, either generally or against a particular adverse claimant, then, his possession deserves respect, however fallacious his views and claim;

(a) In *The Digest* we find:—"*Possessio* is so called (so Labeo says) from the notion of sites and locality, as it were 'position;' since, in a natural way, it attaches to him who is there stationed."

he is an honest possessor: the non-possessor must prove, as well as assert in a juridical manner, his title, his abstract Right.

Every system of law limits the period within which a mere Title is permitted to be proved, so as to disturb a possessor.

"Prescription is a manner of acquiring and losing the "Right of Property in a thing, and of all other Rights, "by the effect of Time. Thus a fair and honest possessor "acquires the Property of an estate by the peaceable pos-"session during the time regulated by Law; and the ancient "proprietor is stript thereof, for having ceased to possess "it, or to demand it during the said time. Thus the cre-"ditor loses his debt for having omitted to demand it within "the time limited for prescription, and the debtor is dis-"charged from it by the long silence of his creditor. Thus "other Rights are acquired by a long enjoyment, and are "lost for want of exercising them.

"Seeing prescriptions have been established for the public "good, that the Property of things and other Rights may "not be always in an uncertainty, he who has acquired the "prescription has no need of a title: the prescription being "to him instead of title.

"Prescription being founded on the duration of the posses-"sion during the time regulated by Law, it is acquired "only after the said time is elapsed." DOMAT

Such is the principle and ground of acceptance of long

possession instead, or as an irrebuttable presumption of Right to possess, and even of entire proprietary interest. But this principle is built upon, used, differently, in different systems.

"If one see his land in the possession of another and say "nothing, it is lost after twenty years; moveables after ten "years." (Hindu Law, YAJNAVALKYA)

"Right to keep by reason of possession shall arise, with "respect to land after two years, with respect to every "thing else after one year." (XII Tables of Rome)

"To suits for the recovery of immoveable property or of "any interest in immoveable property to which no other "provision of this Act applies, the period of twelve years "[is limited] from the time the cause of action arose." (Indian Act XIV of 1859)

The word 'prescription' is taken from the old Roman *formulæ* of procedure. When a defendant had a preliminary objection to the usual rule of Law being applied to the facts, even as alleged by the claimant, he caused his objection to be prœ-scribed, written before or at the head of the *intentio* (the statement in which such application of Law was demanded). One of the most usual of those objections, was lapse of time, *præscriptio temporis*.

The modern use of the word assimilates it to the really significant term or phrase in the *jus civile* for acquisition of ownership by length of possession, *viz.* 'the authority

of use,' 'taking by use,' the *usûs auctoritas* of the XII Tables and the *usucapio* of later days.

'Limitation' is the term now applied to bar of remedy, by reason of lapse of time.

When dealing with Possession as indicative of Right, we are but explaining or illustrating a portion of the canons of evidence, of probatory science, *scil.* presumptions, as, either—1. merely rational inferences arising from the circumstances of the particular case; or—2. declared postulates and imperative rules (based on such inferences,) laid down for guidance of the tribunals.

Of the first class, is the presumption that a present possessor is, therefore, an owner; an inference and impression subject to be rebutted and removed by proof of the existence of facts which account for the possession in a different manner. Of the second class, is the Right, or immunity from question, which the lapse of a certain period may confer on a possessor.

So, when we enquire how possession is acquired and shewn, we are necessarily dealing with proofs. To possess, is, to have, to have immediate, direct power and control over: it is the nearest, the most obvious, if not the most complete relation between a person and a thing. Having once ascertained the idea, to develope or realise that idea, by defining or describing acts and facts which shew one to be a possessor, in a juridical sense, is, to give a

chart, or an outline, of the proofs of possession. Titius holds in his hand a jewel—here is mere physical detention—does Titius use the jewel? does he refer, by act or word, to another as owner of the jewel? does any one assert, during Titius' holding of the jewel, any claim or objection in reference to it, or to the possession of Titius? —these are enquiries, suggestive questions, which tend to ascertain a desired conclusion, a new fact or circumstance, *viz.* the interest of Titius, the juridical relation which Titius bears to the jewel,—and whether he have any, whether some and what qualified, whether an absolute Right, to possess, to enjoy.

If, then, it be sought to ascertain the interest of a possessor or holder, the enquiry is—how came he in possession—in virtue of what interest, right, title, or under what circumstances (such as do not imply interest or right or title, *e. g.* finding, delivery by one not having Right)?

But, possibly, the origin of the possession may not be discoverable. This, as above noted, can never be material before and until *some* title or legal ground and claim of possession is distinctly proved in and by another.

Hence the popular adage, 'Possession is nine points of the Law:' it is, however wrongful, a juridical fact, and is associated with the law dogma, the *primâ facie* presumption of Right (a); this has to be displaced. The wrong concerns him alone whose Right is interfered with

(a) *scil.* Every possessor has a Right; Titius is a possessor; therefore, Titius has a Right.

—a Right which the Law must undoubtedly vindicate, when informed, by proof of some fact which outweighs the one fact of mere possession, and displaces the inference arising from it: the necessity for that proof is the Right of the *de facto* possessor and claimant. (a) Extent or character of proof is a distinct question. Adverse proof is a contest of antagonist forces; as one position is lost, new ground may be taken up: it is a matter of Procedure, which is the logic and machinery of litigation.

The Hindu *Sastras* say,—

"A gift or sale made by any other than the true own-
"er must, by a fixed rule, be treated as not made, *i. e.*
"where occupation is proved, but no sort of title appears:
"title, not occupation, is essential to its support." MANU

Versatile and plastic as are modes of Possession, they are less so than modes of Property—varying phases of, changes rung upon the rule of *meum* and *tuum*. Property, generically, indicates and expresses an adjustment and division in enjoyment of things, *scil.* whatever is external to the Person; it is a concrete or compound idea, and capable of analysis. Titius owns a horse: for one or two hours of the 24, Titius rides or

(a) The importance of 'possession' as a jural fact irrespective of Title, inevitably leads to unscrupulous, violent and successful effort to change the status, in that respect, of concurrent claimants. Hence the Roman interdict *unde vi*, to restore, summarily, forcibly-wrested possession, which has analogies in modern codes. Besides, an actual possessor may of-course, as noted supra, p. 27, protect himself against lawless violence.

drives the horse, which, for the remaining hours, is in the keeping of Marcus; who has contracted with Titius, to feed and lodge his horse—in consideration (*i. e.* taking as a remuneration) that Marcus is at liberty to employ the horse when not required by Titius: Quintus hires the horse from Titius, for a month, to ride and use, without disturbing the arrangement with Marcus: Titius sells the horse to Caius, to be delivered when the month of Quintus is expired. Now, after the sale, and during the month, no less than four men are separately and distinctly interested in, and have differing juridical relations with the horse, and with each other; each interest being an off-shoot or fraction of the ownership or *dominium* (mastery), which at first was simple and entire in Titius. Here we have,—mere or naked ownership (beneficially, but representing, held for protection of others' Rights)—divided proprietary interest—possessory interest—partial usuary or using interest. These may be multiplied, by continuing the resolutory process, the analysis and separation, the multiplication and dividing of the attributes and advantages of complete, exclusive Property, or, entire, undivided dominion, over a thing.

Property cannot be an abstraction. It must be connected with Possession or with Use, mediately, contingently, potentially, or actually and directly. So may be said of Rights severed from the full dominical power (of ownership, fruition, disposition) expressed by 'property,' *dominium*. A Right to drive or to walk over a neighbour's field, a

Right to pluck fruit from a neighbour's orchard, a Right to drain water from your own cultivation through your neighbour's—those valuable Rights are, as Rights, intangible: but, the Right of owning a house, a field, a horse is, in like manner, intangible; it is an idea, a potentiality; differing from the three Rights first named, in extent, in degree, not in kind.

A juridical distinction however, has been adopted from the Roman jurists, who distinguished claims or Rights over or in a subject of Property, but which are severed from the larger Right of Ownership, dominical title, also from Right of Possession, as of a different class, 'incorporeal.' True it is, the one description of Right is not so substantially represented as the other; it lies, practically, in the conduct and forbearance of the (so-called) proprietor or possessor: but, this is a circumstance merely, accidental, not a jural difference, and affects, not the character of the Right, but the facility of its enjoyment or exercise. In each case, the *corpus*, the substance, the land which furnishes the Right, is the essential, the one indispensable incident; thus distinguishing the entire class of such Rights from a Right of conventional obligation, which is represented, solely, by the conscience, the moral will of the person bound. The latter is an abstraction, something incorporeal. (a)

(a) In the Roman distinction of prædial (*i. e.* real) and personal servitudes, there is reason; the epithets showing, that the benefit, the *pro tanto* subjection of the servient *res*, was, in the one case, attached to the person, in the other, no other-

The word 'interest' is a common indefinite term used in describing modes of right to possess or to enjoy; 'possessory interest' 'usufructuary interest,' 'proprietary interest,' 'disposable interest,' 'alienable interest,' 'hereditary interest'—all or either of which may or not be conjoined with the fact of holding; a fact, in itself presumptive of every interest in the jural holder.

The thing or subject possessed is called 'a possession:' so the subject of property or proprietary interest, is called, 'a property,' (a) and, if in land, 'an estate;' the last term being also, and more correctly used as synonymous with 'interest,' *e. g.* hereditary estate, life-estate, estate for years.

Heirship, Succession: Use.

Each man having but a limited period of life (—the maximum is not indefinite—), wherein all his bodily fa-

wise connected with a particular person, than as owner or occupier of a particular *prædium* or estate; resembling an incorporeal right in the *quo estate*, of English law.

(a) A learned French Jurist (M. Marcadé, *Elemens du droit civil Français,)* has, not more ingeniously than truly, remarked:

"Quoique la propriété, *dominium*, soit un droit, une chose incorporelle, comme "l'usufruit, l'emphyteose, l'usage, les servitudes fonçières, on ne lui donné cependant pas ce nom; on n'appelle *droit* dans une chose, *jus*, que le droit "démembré de la propriété, jamais la propriété elle-méme. Quand il s'agit de ce "droit de propriété, on en fait abstraction pour ne considerer que la chose corporelle qui en est l'objet. Et cette habitude de confondre le *dominium* qu' on "a sur une chose avec la chose elle-même, est si naturelle et si profonde que si "d ' une part on indique la chose pour exprimer le droit, souvent aussi on indique "le droit pour exprimer la chose. On dit frequemment: Vous avez là une jolie "*propriété*, vous possédez de vastes *domaines*."

culties and means of enjoying the things of Earth must be exhausted; it may seem idle to give him, to suppose him to possess, never-ending relations with those things. It is, in truth, a supposition, a fiction, meaning something else than the words in which the idea is usually clothed may intrinsically convey.

The hereditary (or substitutive) principle included in that idea is natural and necessary, not merely civil or artificial: the power to aliene included in that idea is but a development of the power to use and enjoy; 'disposition' being, in some sense, a mode of enjoyment and putting to use.

"The uses of every possession are two, both indeed "essential, but not in the same manner; for the one is "strictly proper to the thing, the other not; as a shoe, for "instance, may be either worn or exchanged for some- "thing else; for both these are uses of the shoe; for he "who exchanges a shoe with some man who wants one, "for money, or provisions, uses the shoe as a shoe, but not "according to its proper use; for shoes are not made to "be exchanged." - ARISTOTLE *Politeia*

In referring to 'succession,' or substitutive ownership— a substitution distinct from the ordinary notion of alienating, inasmuch as it is to fill up a vacancy, to supply *an* ownership where, otherwise, the subject would be derelict—we must, as in all other stages of our study of jurisprudence, avoid confounding the modes which, in

varying civilizations, the necessity has assumed, with the juridical idea itself. That idea is well illustrated by the familiar maxim in physics, that, Nature abhors a vacuum. In like manner, civil society and civil law abhor (do not admit of) unowned *res* or subjects of Property, within their territorial limit; the ownership must be somewhere. The operation of the idea, of the rule, must, of-course, depend upon the idiosyncrasies of each system.

And, that rule of necessity being a basis, another step, scarcely less inevitable, in building upon it *a priori* is, the moral, the natural, the civil idea and consideration, that, the natural dependents upon the deceased citizen's bounty or labour have to be provided for. The relation of those dependents to, their claim upon the left estate of their late supporter, their head, their cause (if a direct ancestor), could not, it is submitted, but be acknowledged by the rudest healthy mind—could not (what is more, perhaps, practically to the purpose,) but be felt by every father, by every man not alienated from his kind. It is an inevitable adoption of the Law and suggestions of Nature, and is in close civil relationship with Family-Rights. [(a)]

(a) Two more defined and marked exemplifications of the views now offered could scarcely be found, than the Roman and the Hindu plans of succession.

In the former polity, the Law (in its general provisions or made for the occasion,) designated the *hæres*, upon whom the *persona* should devolve. A provision of the XII Tables either introduced or sanctioned the exercise of a power to burden the *hæres* with dispositions, *legata*, legacies, at the will of

Civil law invariably and necessarily provides for the vacancy caused by death of a citizen, whether vacant ownership, or vacated and continuing duties.

In respect to the vacant ownership, it is of-course provided for in entirety; whether it devolve *per universitatem*, in the mass, as it did upon the Roman *hœres;* or in capricious fractional proportions, as among Mahommedan sharers and residuaries; or, as to one description, in the mass, and as to another in fractional shares, as in the English real and personal successions. (a) The

the (then) defunct donor. Various juridical contrivances and enactments protected the natural dependents of a testator from cruel or manifestly unjust disappointment: *scil.* the *querela inofficiosi testamenti*, the *portio legitima.*

Spiritual or religious obligations envelop and hem in the Hindu: they are due to the dead: the Law designates by whom and how they shall be fulfilled; and, associated with the right and duty to fulfil them, is, the devolution of the property left, burdened with those obligations, also burdened with fulfilment of family and other responsibilities.

In each of those systems, but one juridical idea of succession is traceable, *viz.* that the ownership must be provided for, to the dead man's substance: but, the mode, in each, is governed, prescribed, by the paramount maxims, the dominant motives, the current and regulating principles of the particular social scheme; the variations or differences between one code and the other, being (as before observed of Property) phenomena, not of jurisprudence, but of another kind.

(a) The modes and maxims of descent of lands in the English Common law were of a purely feudal character, *e. g.* primogeniture, early introduced when foreign feudal sovereigns forbade any division or splitting of fiefs; preference of males, because of military services; exclusion of ascendants, as being incompatible with the constitution of the feud. With respect to adoption of any such rules in the inferior or agricultural tenures, Sir Martin Wright (*Law of Tenures*) relates, that it was "in imitation of the more honorable Tenures." Elsewhere we read, with reference to the introduction of primogeniture, "The progress of the right "of primogeniture in public, corresponds to the same progress of it in private "successions. Thus in the two first races of the French monarchs, the succes-"sion to the kingdom was divided among all the sons; and in the earlier "periods of the Saxon history, the same division of the kingdom is frequently "observed to take place." and as to collateral succession, "—by practice, without

power of posthumous alienation—exercised either, by designing a plan of succession for one's self, or by abstracting something from the property to devolve upon a Law-named successor, in favor of parties not contemplated in the general provisions of Law—has been wholly or partially admitted, according as each civil system encouraged or recognised the alienating and disposing attributes of Property. An advanced stage of national progress, intellectual and moral, justifies the removal of all restraint, as affecting private interests, (a) an entire commercial license in disposal of Property and Rights, whether *inter vivos* or to take effect on death. This has come to be the case with the English. (b)

"a public ordonnance, it crept into the law of Great Britain, as well as into "that of other European nations, that not only in *feudis paternis*, but even "in fiefs which a man had purchased himself, his collaterals *in infinitum*, as "well as his descendants *in infinitum* should succeed." (DALRYMPLE)

From *Magna Charta* it is apparent, that English Common law protected the claim of the widow and children to a *rationabilis pars* of personalty; inasmuch as, the 18th sec. after providing for levy of the king's debt out of his tenant's *catalla*, ordained, '—*residuum relinquatur executoribus ad faciendum testamentum defuncti et si nihil nobis debeatur ab ipso omnia catalla cedant defuncto salvis uxori ipsius et pueris suis rationabilibus partibus suis.*' And in the Register of old writs are found, accordingly, the king's writs on behalf of the widow and of the sons and daughters, against the executors. This *was* the custom of the realm; one third only could pass under a last will.

In Scotland the '*jus relictæ*,' 'Dead's part,' and 'Legitim,' are (as much else in Scottish jurisprudence) a modernised edition of the great prototype born and matured on The Seven Hills.

(a) and where Public policy is not contravened, as in the English 'perpetuity.'

(b) Lord Chief Baron Gilbert gives the following reasons why, under the original feudal law of England, introduced at the Conquest, landed estates did not ordinarily pass by last will—" A feud was at first no more than the right which "the vassal had, to take the profits of his lord's lands, rendering unto him

A learned English civilian (Swinburne), comparing the grounds for a restraint imposed by custom in England (formerly general, now very restricted) upon testators, and the reasons for abolition of all restraint, quaintly sums up; "—Surely, the custom hath as good ground, in rea-"son, against lewd husbands and unkind fathers, as hath "the Law, in meeting with disobedient wives and un-"thrifty children!"

The Use of a thing, is, taking from it, making it the means of, any advantage, profit, benefit whatsoever of which the thing is capable—the doing with it any act whatever, applying it in any manner, by which any effect, good or bad, is produced.

Merely looking at some things is using them, *e. g.* pictures and other similar works of art; inasmuch as, to be seen, is the only advantage (or means of advantage) they can yield, the end therefore, primarily, of their formation and existence.

"such feudal duties and services as belong to military tenure; so that the "tenant had only the use of the land, and the Property still continued in the "lord—on the death of the tenant, the land lay empty and fell into the lord's "hands, and the taking it out of the lord's hands was called *relevium* [when "it devolved upon the natural heir as the lord's ward, and burdened with the "widow's thirds or dower,] which was in the nature of a new purchase—— "Besides, this way of conveyance [by last will] wanted that solemnity, which "the feudists thought necessary to establish in transferring lands, that if at "any time a dispute should arise, it might be the easier determined by the "*pares comitatûs*, who were witnesses to that notorious and public manner "of conveying by livery—"

Not so with what exists for more practical ends, and does not in any way exhaust its purpose by being seen, *e. g.* a steam-engine, a loaf of bread.

So that, the dealing with a thing, to be a use of it, must be a material dealing, a dealing which is, in itself, an end, something gained, not a mere inchoate and intrinsically ineffective proceeding, *e. g.* taking a loaf in the hand before and in order to its being eaten. If the loaf be restored to its place, put down again before any portion of it is eaten; the loaf has not, at all, been *used.*

The loaf belongs to a class of objects which jurists call fungible, *i. e.* functionable; one loaf may, ordinarily, represent, do the function of any other loaf of the same sort. And this must be so with whatever things are consumable, or got rid of by mere using; in other words, by applying them to their legitimate purpose, their being put to use: such are, all edible things, current coin. They are, as a rule, regarded generically, not specifically.

The term, Possessor, should not, juridically, be applied to one who claims to detain merely, without, at least, temporary or qualified proprietorship or proprietary use; *e. g.* a creditor who holds a pledge as security for his debt. His possession is vicarious, although his holding is lawful: all that he possesses, rather owns, is, his own (creditor's) interest in the thing—this justifies his detention,

justifies, moreover, his compulsory representation of the debtor *quâ* owner or jural possessor.

So, a Right to use is by no means identical with the full jural possessory Right; the usuary holds, subject to his own special interest, for and as representing him who has the general possessory interest *extra* the separated use.

Benefiting by taking the fruits and produce of a thing (*e. g.* milk from a cow, fruit from a tree) is something else than the merely using the thing *in specie;* the fructuary is not necessarily the possessor.

Nor can it be otherwise where the two rights are united, in 'usu-fruct'; which must usually include the right to hold, as an incident or means of using, and does not signify or indicate a larger possessory interest than belongs to the user or usuary.

Seignory, Seignoral Right.

The notion of Property altogether disconnected from present or future Right to possess or to use, has been a device of military or despotic rule; it is intrinsically, a refinement, the product of an artificial and non-natural state of society and manners.

Such ideal, detached, nude Property is, when analysed, rather a Personal than a Real relation, and may be described—a reservation, retention of a relative lordship, mastery, dominion over the owner of a thing,

in respect of such ownership, after the thing itself, together with the power and Right of enjoyment or use of the thing, has passed away from him who claims the reservation.

We might suppose a patriarch thus portioning members of his family, *i. e.* reserving some paramount power to interfere; while he separated and gave up the ordinary, the actual and beneficial enjoyment of landed or other family possessions.

The feudal relation, when fiefs first became hereditary, is an instance of this anomalous proprietary relation. (a)

As a supplement to or comment upon the above analysis of Property, Possession and Use, may be noted a succinct

(a) Mr. Butler in his celebrated Note (on Feuds) to *Co. Lit.*, remarks of the relation, at that period;—"Though in point of dignity, of rank, and of "honor, the lord, according to the ideas of those times, enjoyed a splendid pre-"eminence over his vassals, his power over them was, comparatively speaking, "extremely small.—The fruits and incidents of the feudal tenure, in the original "simplicity of the feud, were reducible to two: on the part of the lord, to the "obligation of warranty, that is, to defend the title of his tenant against all "others: on the part of the tenant, to an obligation of giving his lord his aid, "that is, his military assistance and services in defence of the feud."

Seignory, in relation with Property, is closely analogous to the *dominium eminens* or paramount, imperial control which appertains to the sovereign authority of each State in relation with the Subject's private ownership. "Kings have power over all things (the lordship); individuals have property "(ownership). The city is the king's; but nevertheless in the city each has "his own.—Therefore, though lordship and ownership are commonly acquired "by one act, they are really distinct. The ownership may pass not only to "citizens, but to strangers; while the lordship remains in the same hands as

and .ingenious account, from the able pen of the late Professor Richard Jones, (a) of proprietary dealing with, and division of interests in land:—

"I say it is an instinct which causes the appropriation, "by communities of men, of the soil of the regions they "inhabit, however loosely and imperfectly they occupy "them. (b) When a civilized man comes into contact with "the rudest communities, he must traffic with them in "order to keep up an intercourse. The merest savage "asserts the claim of his tribe to the soil, and yields it "only upon terms of barter. It would be impossible, "perhaps, to arrange such terms if some form of Gov-"ernment was not recognised and obeyed. Those who "compose that Government, be they elders, chieftains, "monarchs, or even general assemblies, have the disposal

"before." (GROTIUS, Whewell). "The right which belonged to the society "or to the sovereign, of disposing, in case of necessity and for the public safety, "of all the wealth contained in the State is called the 'eminent domain.'" (VATTEL)

Feudalism and sovereignty were, at least in the origin of the former, closely allied. M. Fœlix well observes:—"Au moyen age, la doctrine de la "réalité des statuts avait trouvé une seconde base dans les principes du droit "féodal. A cette époque, les devoirs féodaux etaint les *devoirs principaux dans* "*l'ordre social*, et le principe de la sujétion de l'individu au pouvoir souverain "n'avait pas encore reçu son developpement actuel; ces devoirs féodaux derivant "de la posssession d'une terre, &c." *(Droit International privé)*

Thus, the notion of seignoral Property seems to be a confusion of incidents taken as well from dominical (or ownership)-Right as from sovereign-Right.

(a) Literary Remains edited by Dr. Whewell.

(b) "In the lower animals we trace the same instinct. The town of Con-"stantinople is divided between different canine communities, who worry to "death all intruders on their domains, but live in a sort of dog-like amity "with each other; and all who observe poultry and domesticated animals may "trace the same feelings and the like habits in them."

"of this right of the community to the soil, and deal "with it, foolishly and rashly perhaps, but with an un- "questioned title. Where the soil is not parted with, but "retained, a few steps in the paths of industry and "civilization lead to the carving of different individual "rights out of the general right of the community. This "has hitherto been the point at which the position of "the various classes of cultivating occupiers is first deter- "mined, a position which that class ever changes with "difficulty, and which, over the greater part of the Earth's "surface, they have not changed at all. When land is "owned, either by the State, or a body of land-owners, "the mere labouring occupier must submit to some con- "ditions involving always the securing of a part of the "produce to the owner, or he will not be allowed to "occupy it at all. And these conditions may not only "determine the amount of produce he shall retain, that "is, his wages, but may determine also his social condition. "By very far the largest division of such occupiers in "former ages of the world, and probably still the largest "in our age, consists of cultivators who occupy land under "the State with claims legal or prescriptive to treat "their right of possession and occupation as hereditary, "while they fulfil the conditions imposed on them. This "is the case with the greater part of the peasants of "Asia." Further on, Professor Jones observes :—

"With exceptional cases, rarely extending to any consi- "derable portion of its surface, the Earth, by the kind

"provision of the Creator, yields to the labor of a family "more than is sufficient to support that family, and to "carry on its own cultivation. This excess we may "call the *surplus produce.* The whole of this produce "the monarch or the State may appropriate without "stopping cultivation, and by the native rulers of Asia "it has been appropriated."

SEVENTH SECTION

GOOD FAITH: CONVENTION

We have classed Good Faith as a Right of the Person. It is the foundation, the inherent condition, the very life of intercourse between man and man. Social communion cannot exist without it. It is, therefore, a natural and a jural right. The generic name for breach or absence of good faith is, Fraud.*

Fraud is Protean in variety and aspect, in kind and in degree; varying from the most palpable, malicious and mischievous perfidy, to practically harmless equivocation. This, (and more,) casuistry may often justify; and, at the worst, it but dims the personal honour of the doer.

Civil Law sanctions are not co-extensive with the Moral Law, in support of Good Faith, of Truth: every

falsehood, every intent to mislead, carried out by word or act, is immoral, a breach of morality. But, all are not civil injuries; the loss or damage resulting from some of those breaches, being speculative rather than real, *e. g.* a false description of things or events, to one whom those things or events in no way concern and can in no way (other than in idea,) affect: where the thing or advantage lost is not an appreciable or civil Right. There must be, to constitute a legal wrong, *damnum* a civil grievance, as well as *injuria* a breach of law.

How large a Right may be included in the generic term, Good Faith (the inherent social Right of every man), but little consideration is needed to show.

Not merely honesty in contracting, but honesty, practical sincerity, fair dealing, active right-mindedness in every legal relation, in every jural act.

Wherever one man's folly or rashness, much more his positive negligence, and *a fortiori* his misrepresentation, has directly led to alteration of another's condition, to another's detriment—there, a jural wrong is manifest.

The quotations which follow, are authoritative expositions of certain breaches of good faith, which are violations of the Common law of England.

'Though a man doth a lawful thing, yet if any damage do thereby befal another, he shall answer it, if he could have avoided it.'

'That person is undoubtedly liable, who stands in the relation of master to the wrong-doer—he who had

selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or immediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference.'

'He that receiveth a trespasser and agreeth to a trespass after it be done, is no trespasser, *unless the trespass was done for his own use and benefit,* and then his agreement subsequent amounteth to a commandment.'

'Where, by any unwholesome practices of another, a man sustains any apparent damage in his vigour or constitution; as, by selling him bad provisions or wine; by the exercise of a noisome trade which infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon or apothecary. For it hath been solemnly resolved, that *mala praxis* is a great misdemeanour and offence at Common law; whether it be for curiosity and experiment, or by neglect: because it breaks the trust which the party had placed in his physician and tends to the patient's destruction.'

'An action will lie wherever there has been the assertion of a falsehood with a fraudulent design, as to a fact, when a direct and positive injury arises from such assertion.'

'The confidence induced by undertaking [*scil.* voluntatarily and gratuitously] any service for another, is a suffi-

cient legal consideration to create a duty in the performance of it.'

Those instances are, no less, an illustration of the rules of general jurisprudence. A scientific social system, a rational and practical scheme of civil Law for a highly civilized people, looks for and demands great and uniform circumspection and self-denial, as well as honest intent, in the conduct of each individual. And this is but a development of good faith, an enforcement, within the range of coercive Law, of the comprehensive moral doctrine and precept,—'Do unto others as you would that others do unto you!'—or, 'Do as you would be done by!'—a most valuable suggestive precept, and a clear warning and protection, in the main, against cruelty or outrage or unfair dealing. The precept however may not, ordinarily, serve as a key to moral conduct; inasmuch as, the standard 'as you would be done by' is uncertain, fluctuating, and hardly possible of general application.

It may be paraphrased, as a safe negative guide—'Do not to another, what you know you would not, being in his place, have done to you!'

Christian readers need not to be reminded, that the spirit and nearly the tenor of this rule or direction is borrowed from the beautiful Sermon on the Mount, where it reads,—

"All things whatsoever, therefore, ye would that men "may do to you, so do ye also to them!"

In the apocryphal book of Tobit we find the more narrow rule,—"Do to no man that which thou hatest!"—less comprehensive and admirable in spirit, but a more precise and practical normal guide of conduct. (a)

Convention, Contract.*

This is the Voluntary Tie, the artificial *vinculum*, created by private will—not by the will of the community, the Law; it is the immediate product of Good Faith, of mutual trust and confidence.

When men come together, are drawn together, in good faith, in order to carry out their respective wills by combination and co-operation, not infringing Law; they are said to contract (*con* together, *tractus* drawn), to covenant (*con*, *venio* to come), or, using the same words substantively, to make a contract, to make a covenant. Their co-operation (*con*, *opera* works) is carried out, manifested, either;

(a) From the New Testament we also gather—"Love thy neighbour as thyself!" To accomplish this, to attain this standard, the apostle Paul twice designates, "a fulfilling of the whole Law," inasmuch as "love worketh no ill to his neighbour" (*tō pleesion*, to one who is near him—with whom he is brought in contact—with whom he deals). The Good Faith of Jurisprudence is thus, in a measure, identified with the *agapee* (often translated 'charity') of the Christian scheme; that *agapee* described, by the same Paul, as "the bond [uniting ligament] of perfectness." By 'perfectness' is intended, complete obedience and blamelessness. Civil Law, within its own range, preserves and keeps inviolate that bond, *i. e.* wherever the rupture is the least civil wrong. Beyond, is the sphere of morals, of the spiritual.

Professor Foster (*Elements of Jurisprudence*) maintains, that the rule, as expressed by the phrase—'do as you would be done by,' is a complete guide and established a fundamental principle.

1. by something done at the moment, *e. g.* an exchange of a horse for a book; or, 2. an asserted resolve, on one or both sides, to do something at a future time, as, to give the horse or the book ten days hence—or, when something specified shall have occurred. Such asserted resolve is, a promise, an undertaking.

"The use of covenants is a natural consequence of "the order of civil society and of the ties which God "forms among men. For as he has made the reciprocal "use of their industry and labour and the different com-"merce of things necessary for supplying all their wants, "it is chiefly by the intervention of covenants that they "agree about them. Thus, for the use of industry and "labour men enter into partnership, hire themselves and "act the one for the other. Thus, for the use of things "when they have occasion to purchase them, or a mind "to part with them, they traffic in them by sales and "by exchanges, and when they only want them for a "certain time, they either hire or borrow them; and "according to their other different wants, they apply "to them the different sorts of covenants.—

"The subject matter of covenants is, the infinite di-"versity of the voluntary ways by which men regulate "among themselves the communication and commerce of "their industry and labours and of all things accord-"ing to their wants. The commerce and communica-"tions for the use of persons and things are of four "sorts, which make four kinds of covenants. For those

"who treat together, either give to one another reci-"procally one thing for another, as in a sale, and in an ex-"change; or they do one thing for another, as they undertake "the management of one another's concerns; or otherwise "one of the parties does something, and the other gives "something, as when a labourer gives his labour for a "certain hire; or lastly, one of them either does or "gives something, the other neither doing, nor giving "any thing, as when a person undertakes without any "gratuity to manage the affairs of another, or that one "gives another something out of mere liberality." DOMAT

The four are, shortly; 1. *do ut des;* 2. *facio ut facias;* 3. *facio ut des, do ut facias;* 4. gratuitous: the three first are bilateral, reciprocal; the fourth, unilateral, in action. (a)

(a) The Mahommedans scarcely recognise such unilateral or gratuitous transaction. With them, 'gift' seems but a venture for an expected 'return,' which establishes reciprocity. A saying of the Prophet is recorded,—'A donor preserves a right to his gift, so long as he does not obtain a return for it,'—hence, disability to retract is exceptional. The same jural ideas are carried out in the relations of the wife's right, *muhr* or dower, with the marital power and privileges. (*Hedaya, in loc.*)

In another sense, it may well seem inconsistent and illogical, to describe 'gift' as a unilateral transaction. The part of the receiver is not onerous or responsible; yet is his part not unimportant, since he must give accord; and, as must be assumed, he, by so doing, gratifies the giver of the gift, *scil.* by acceding to the latter's wishes and act. Benefaction, however, real or ostensible, is the normal, recognised character of those human dealings and interchanges with which civil Law has to do. The donor or giver's self-satisfaction is no appreciable civil gain; the civil benefaction of a 'gift' is therefore one-sided. But, Justinian, sympathising with the feelings of indiscreetly liberal and ill-used donors, conferred on his subjects a general authority ('*generaliter*

The essentials and determinate incidents of every contract or covenant are, 1. the parties to it, 2. the subject-matter, object of it, 3. its mode or form.

All persons having separate juridical existence, *scil.* whose *status* does not involve a disability to speak and act for themselves, may contract; thus, children and madmen are alike incapable.

The field for the matter and object of contracts, is (as already explained), the entire range of action permitted by the Law of the Land; interchange, modification, transfer, partition of Rights, of Property—whatever men may *lawfully* do or enjoy.

The mode, the form of contracting, so as to be the cause of, create Civil law obligations, necessarily varies; but there are characteristics and incidents which belong to every system:—the intent of the parties is to be first considered, whatever the form;—"covenants oblige not "only to what is expressed in them, but likewise to "every thing which the nature of the covenant demands, "and to all the consequences which equity, law, and cus-"tom give to the obligation which the parties have "contracted." (DOMAT) —the exact purport, the terms of the

sancimus'), whatever the status of the parties or the circumstances of the gift, to recal liberality wasted upon the grossly ungrateful and undeserving—'*donationes in eos factas everti concedimus:*' the license to revoke not to descend to the donor's heir. The grounds of revocation mentioned in the Constitution, are; *injuria atrox*, being violence to the donor's person or fraud in prejudice of his fortune, also non-fulfilment of any concurrent provision on the donor's part, whether with or without writing.

contract must be capable of proof;—there must be jural cause or ground of obligation, without which it is a mere pact, having no jural significance.

Each party to a contract invariably, and without express stipulation, undertakes for his own honesty and active sincerity, so far as it obviously depends on him to give his co-contractor the benefit contracted for; *e. g.* the seller undertakes that he has or will have power to deliver the thing, as contracted.

Many so-called contracts are ineffective; and this, not as the result of any arbitrary or merely conventional policy: *viz.* when there is inherent defect in some one of the essentials, such as; personal incapacity, *e. g.* mental weakness or aberration; illegality of subject matter, *e. g.* design to defraud a third person. (*a*)

Each system of municipal laws necessarily has its own view and definition of what facts shall be a cause of obligation, so as to give jural significance to the contracts of its subjects. Arrangement, dealing, promises, transactions, even within the pale both of moral and civil laws, where something remains undone, are not always aided, carried to completion, by the arm of Civil Law;

(*a*) Pothier thus classes defects,—error, force, fraud, inequality, want of consideration, want of obligation. In Rome, duress or fraud did not, as with us, annul and disprove the obligation of contract: the remedy was otherwise applied—"*Dolo vel metu adhibito, actio quidem nascitur, si subdita stipulatio sit: per doli mali tamen vel metus exceptionem summoveri petitio debet.*" (*Codex*).

The rigid solemnity of the stipulation put equity in fetters: *coactus volui!* represents, according to Paulus, the position of the compelled promiser.

but are sometimes, to a differing extent and range in different systems of Law, left to the influence of the moral sanction alone. (a)

It may be said, differing systems require different probatory acts in testimony of the existence of the asserted contract, in other words, of its inherent essentials, *scil.* deliberate assent, fair dealing, precision of terms, competency and legality. This hypothesis is a ready speculative solution of the difficulty, but not, historically, admissible; for it assumes the conduct of every Nation to be always rational. (b)

The subject matter and generic description of the usual or most prominent contracts, *scil.* conventional acts, negotiations, arrangements, are; sale and purchase; loan; letting and hiring (including servitude and employment); bailment or deposit; agency; suretyship and guarantee.

(a) The nice requirements of 'Consideration,' in the English Simple-contract; the strict requisites in the *obligatio verbis* of ancient Rome; the precautions enforced in contracts relating to property of a British Ship, in contracts protected by the English Statute of Frauds: these are familiar instances.

(b) A passage in Professor Bell's 'Principles of the Law of Scotland,' under the head, Conventional Obligations, is a ready illustration of the arbitrary differences in different systems, *scil.*—"The law of Scotland does not follow the "Roman law of *nudum pactum* on the one hand; nor recognise the subtilties "of the English Law on the other." Lord Loughborough, when deciding that a contract to succeed another in a public office was void (because impolitic), said—"This agreement, resting on private contract and honor, may perhaps "be fit to be executed by the parties, but can only be enforced by con- "siderations which apply to their feelings, and is not the subject of an "action. The Law encourages no man to be unfaithful to his promise; but "legal obligations are, from their nature, more circumscribed than moral "duties."

A gift scarcely has the incidents of contract; nor does a simple or mere exchange seem properly classed among contracts, although the result of contract: they both indicate, *primâ facie*, past events, not subject to any fluctuating will, nor needing support of Law, as contracts. (a)

An exhaustive and scientific, though not minute analysis of the advantages to be gained and the specific obligations created or producible by Contract, was in use with the Roman jurists, each word having a technical force, *viz. dare, facere, præstare; dare,* when the promise or contract is, to transfer Property, in full Right; *præstare,* to afford and furnish something, whether to use, on hire, or for any benefit whatever, other than a proprietary transfer; *facere,* some personal service or act not included in the two preceding, some exertion of the promiser, affirmative or negative, *e. g.* abstinence from exercise of a Right.

Commerce and trade, generic names for interchange of

(a) In Mahommedan law, they are specially classed as contracts, and they certainly, in that system, import more than each transaction, etymologically or in European jurisprudence, signifies: the contract of 'gift' has been noticed *supra* p. 72, n. (a); 'exchange' is, in its jural incidents, but one of the modes or forms of sale,—"Sale is the exchange of property for property, with "mutual consent; and it is constituted by proposal and acceptance, or by reci- "procal delivery." (Baillie's *Moohammudan Law of Sale.*) In Roman Law, the agreement of 'exchange' was recognised, as a jural obligation, only when and if, in execution of the agreement, one of the parties had given to the other the thing, which he had promised to give: from that time a nominate real contract arose. Such, in that case, was the remedy and equity afforded. Exchange is of-course closely connected with, and is the parent of Sale, as presently noticed in the text.

benefits and property, include every variety of contract, of dealing, of confidences, of speculation, *scil.* in pursuit of wealth.

The invention of a representative medium, a type of value, *viz.* current coin, money, necessarily much facilitated transfer of and traffic in every description of property, right and advantage: that invention, however, in no respect altered or added to juridical principles. We translate from *The Digest* the words of the jurist Paulus:

"Buying and selling took its rise from exchanges. Since, "in former times, there was not money, as now; nor was "one commodity called *merx* (merchandise, goods), the other "*pretium* (a price): but every one, according to the exi-"gencies of the day and of circumstances, interchanged "useless things for useful; seeing, it frequently happened "that what was a superfluity with one was a want with "another. But inasmuch as it did not always nor as a "matter of-course come about, that, one man possessing "what another coveted, the former should be willing to "accept, in lieu, what the latter happened to have, there-"fore a substance was fixed upon, the acknowledged and "permanent estimation of which should meet, by its uni-"formity of value, the difficulty of exchanges. That sub-"stance, being impressed with some public device, passes "current as a medium of property, not so much in res-"pect of intrinsic value, as a measure of quantity; hence-

"forth, commodities interchanged were not both designa-"ted *merx*, but one was *pretium*".

Another change brought about by the invention of money, was, the relation of debtor and creditor, in the modern sense and as ordinarily understood, as distinct from the relation created by a deposit or bailment of what, in the language of Paulus, is properly called, *merx*. Loan of money is intrinsically different from the loan of what money may represent: the latter, if an infungible commodity, must be returned to the lender in *specie;* if fungible, must be precisely of the same nature, intrinsically. Money is always not merely fungible, but may intrinsically vary, as silver for gold, and has no other use or value than to be passed away, in exchange for *merx*. The Roman *mutuum* embraced not merely money, but whatever was estimated, in kind, merely by weight, number or measure. The characteristic of the transaction of loan or *mutuum* is thus noted by Paulus;—"It is called giving a *mutuum* "because from mine it becomes thine (*de meo, tuum*): "insomuch that if it does not become thine, the obli-"gation [of *mutuum*] does not arise."

There is a not unusual form of convention or contract, which includes an artificial sanction, imposition of a conventional penalty for violation or neglect of the contract-obligation; as, where a contract may contain a

clause—'If I fail to make delivery as herein agreed, then I shall forfeit and pay to you £100.' It is, in form, an alternative, but, in substance, a punishment or sanction agreed on for the occasion; it may of-course be applied to any manner of undertaking or stipulation.

Each instance, each occasion and kind of contract, obviously must have its own conditions, incidents, varieties.

A seller and a buyer may be distant, the one from the other; thence, or otherwise, a difficulty may frequently arise as to the exact period of completion of the sale, as to when property in the thing sold is intended to be transferred, the date of legal tradition (which is, the placing what is sold in the power and at the disposition of the purchaser). For, the thing sold may deteriorate, be damaged, between the dates of contract and delivery—and this, without fault or injustice of either party: in such case, the expectant proprietor (proprietor elect), although a sufferer and unfortunate, cannot complain of injury; there is loss, but not wrong. Again; the thing sold being delivered, but the price remaining, in breach of the contract, in the hands of the buyer: may the seller, and when, reclaim what he, too confidingly, parted with—rescinding the contract?

All such questions and contingencies must be provided for, either by express pact (*scil.* a supplementary, ancillary contract *quoad hoc,* embodied in or tacked to the

main and principal contract, *e. g.* of sale), or, by equitable consideration and construction of the intent and relative rights of the parties, as, in a sale, of the purchaser and seller. (a)

The general jurisprudence of the matter is but good faith between man and man; necessarily including observance of the special rules, the maxims of the particular polity, the laws of that locality and State wherein is the domicile of the contract, and under or in regard to which it was framed.

The tie, bond, *vinculum* of contract, is untied, loosened, got rid of, *solutum*, by,

1. performance (b);

(a) The *primâ facie* inconsistency in the incidents of the Roman *emptio-venditio* (as of the Scottish contract of sale), *viz.* that, although until delivery, the seller remains proprietor, yet, after the bargain and before delivery, the commodity is at the purchaser's risk, is thus explained by Professor Ortolan:—

"The seller remaining proprietor, as a consequence, if there be an increase, "by bearing fruit, by alluvion, from any cause whatever, he it is who becomes "proprietor of the fruits, of the accretions; if the commodity deteriorate, if "it perish, his right as proprietor is lessened by so much, or is extinguished. "The Law speaks not, in such case, of the Property. But what is the effect "of the contract of sale? It is, to produce obligations: the seller is under "obligation to deliver and make over the commodity to the purchaser: and, "if, after the sale there be fruits or accretions, certainly he is under obligation "to deliver those up: if the commodity have lessened; or deteriorated without "fault of the owner, he shall not be then bound to make it over to the purchaser "otherwise than in its diminished or deteriorated condition: should it have "perished without fault of his, then his obligations are put an end to".

And this seems a rational conclusion.

(b) *dando, faciendo, vel præstando*, according as the tenor of the obligation may be: *solutio* of the bond or obligation in a contract of loan, *mutuum*, (in Mahommedan law, *kurz*) is, of-course, 'payment' or its equivalent.

2. any event that precludes or supersedes or excuses performance, *e. g.*—death, where a particular person only is either to do or to receive the obligatory act—compromise —release.

It cannot but occur to the student, that, contracts and voluntary obligations bear a relation to the general rules of any system of civil Law, similar to that borne by civil Law to the moral Law, *i. e.* they are supplemental and specific, not original and necessary, nor universal. The obligations of a contract are a development and illustration of Law, rather than Law proper.

The position may be thus exemplified:

Universal Law, the necessity of things, the voice of Reason argues and dictates, that, long, deliberate permission of acts inconsistent with an alleged Right, should be received as evidence of abandonment of the Right.

A rule of civil Law enacts,—if A permit B to exercise manifest, uncontrolled, continued dominion over A's estate for—say, ten years, A cannot claim any legal remedy to recover his estate: it is, virtually and effectually, forfeited.

Civil Law enacts; if one citizen bind himself, deliberately and validly, *scil.* contract, to do any lawful act in order to benefit another, and do not do it; the defaulter shall make compensation.

A contracts to deliver, for a price named, certain merchandize to B, on a certain day: when the day comes, B tenders the price, but A refuses to deliver the merchandize, the market value of which, at the date of that refusal, is double what it was at the date of contract. The Law (under the general enactment recited) compels A to give to B, instead of the merchandize, and without price or any thing in exchange, the profit which B might have made, had A kept his word. (a)

Here is a clear analogy and parallel.

True and philosophic, then, is the declaration in the Hindu code:—

"When a gift is made, in due season, place and "manner, in good faith, and to a fit person; all this gives "the idea of Law." YAJNAVALKYA

In the same current of thought, and not less significant are the Decemvirate laws,—"Whatsoever any head of a "family shall choose to ordain concerning the disposition of "his wealth [*scil.* after death,] or the wardship of his "children, let such ordinance be received as Law (*ita* "*jus esto*)!"

"If any make *nexus* or *mancipium* [ancient Roman

(a) "He who, having received the price of any commodity, fails to deliver it "to the buyer, shall be compelled to deliver the article, together with damages; "and should the buyer be from foreign parts, then, the foreign profit [shall "be given]." YAJNAVALKYA

"ceremonials of transfer and obligation]; let whatever "words he may declare [*scil.* as conditions or limitations "in the matter] be received as Law!"

After what is premised, the three-fold division, by Grotius, of Obligations, is easily intelligible, *scil.* into those, by Pact or Contract, by Wrong, and by Law.

Wrong, that great pioneer of jural science defined;—"every fault, either of doing or of omission, which "is at variance with what men ought to do, either "on the ground of their common connexion, or of some "special quality." (Whewell)

There is an essential distinction between obligation under a contract, and obligation immediately under (the rule and command of) Law; a distinction forcibly explained by Pufendorf:—

"In compacts, since they depend, as to their origin, "on our will, we first determine what is to be done, before "we are obliged to do it; but, in Laws, which suppose "the power of others over us, we are in the first place "under an obligation to act, and it is then determined how "we shall act. And therefore none is bound by a compact, "but he who of his own consent has bound himself; but "by a law we are bound, because we owed before-hand "obedience to its author."

An obvious comment upon Pufendorf's exposition occurs, *viz.*—Each system of law cannot but include an injunction,

that the citizen or subject shall honestly fulfil his obligations of contract: so that, the civil-law-imposed obligation exists, but it is moved a step further off, the civil force and validity of the contract being assumed. Still, the distinction noted is a broad one; and it has undoubtedly produced, or aided to produce effects, that illustrate, in a remarkable manner, the relation, the alliance, as well as the distance, between juridical and ethical propositions. Both treat of human conduct; and the former must be based upon, must consist with the latter. Nor are these latter arbitrary; they are immutable, a part of the scheme of the Universe; not creatures or products of that mysterious agent and power, Man's will.

The rules and commands of the Moral law, thus self-existent, Man is led and invited to observe, to know, by his Reason; if he will, he cannot but learn, and, as he grows in intelligence and in development of the higher attributes of humanity, he appreciates them. Hence that 'Moral Sense,' which is but the promptings of Reason, her effort to be heard, the silent, yet untiring monitor

"—— that within us, still
"Restrains our actions, not controls our will;"

and, as Man's moral growth advances, as he learns to appreciate the great master-scheme and science by which his own erring and stubborn will should be guided and disciplined, he imports, more and more, simple moral rules and truths into his own Civil law, and raises his juridical scheme nearer to the standard of Nature's law.

In the moral and civil infancy of a Nation, social, rather civil, organisation is in the rough, in outline, as it were; the cords of duty and of right, provided by the Nation to hold society together, are strong but few, and of a course texture; ethical refinements and niceties are unknown, or, if known and believed in, are regarded as needing super-human effort to observe; and, accordingly, they who do observe them are admired as exceptional beings, purists, soaring beyond the working-day capabilities of ordinary men, moral giants, heroes, gods. Voluntary efforts at right-doing, self-sacrifice or self-denial, without some palpable appeal to self-love or to fears, without appalling incident, or superstitious sanction, are disbelieved in: on so frail a contingency, the Law dare not rely for the ordinary intercourse of life. (a)

(a) Herodotus, the father of formal History, states:—"the Lydians and Medes, "on occasion of solemn compacts (Gr. *orchia*) were used each one to draw blood "from his own arm, and each licked the other's blood" (bk. I, s. 74): "the Arabs "used to make their covenants (Gr. *pista*) in this wise—a man stood between "the contractants, made an incision in the palm of each with a sharp stone, "and, taking a woof of each one's garment, smeared with the blood seven stones "placed in the centre, invoking Bacchus and Urania" (bk. III. s. 8): "the Scythians "poured wine into a large earthen cup, mixing with it the blood of those "who were entering into the *orchia*, having pricked with a needle or slightly "wounded with a sword some part of the body of each, they dipped in the cup "a scymitar, some arrows, an axe and a javelin; then after much invocation, "the contracting parties and the most considerable of those present drank it up" (bk. IV. s. 69): "the Nasamones [an African tribe] made use of this form of "faith-pledging; each one gave to the other to drink out of his hand; but, "should there be no liquid to be had, they took up the dust of the ground "and licked it" (bk. IV. s. 172).

A learned commentator (Rev. Joseph Blakesley) upon Herodotus, observes:— "Some common religious bond was essential to the most ordinary mercantile

Such are results and phenomena familiar to the student of History, few and mythical as are our records of the primitive life of ancient nations: nor is there wanting

"transaction. Without it there could be no valid covenant, for no oath could "be tendered which would bind the conscience of both the contracting parties; "and, without the sanction of an oath, good faith was not to be looked for in "early paganism." And, speaking of the early Greeks;—"The myths of Hellas— "it was enough, at first, if they answered the purpose for which they were produced, "that of securing respect for the rude ordinances which were the earliest legal "check to the ferocity of uncivilised men."

Colonel Tod describing Rajpoot records, political and domestic, of remote "antiquity, relates,—"Every subject commences with invoking the sun and moon "as witnesses, and concludes with a denunciation of the severest penalties on "those who break the spirit of the imperishable bond."

From a Swedish historian (*Geijer*) we learn the ancient usages of a people little if at all known to the cultivated nations of Antiquity, and who trace their government and laws (somewhat as the Hindu legends in the *Sastras,*) to a theocracy. Odin appears to have been with them the type and representation of Divinity; his exploits and power are the pervading theme of their annals, abounding with superstitious incident. The historian says, of the Scandinavians; "Their earliest rulers are styled *diar*, *drottnar*, denominations applying in common "to gods, priests and judges. With twelve such did Odin sit in judgment; and "with twelve of the wisest men the Upsala king uttered his decrees in his Court. "The great yearly sacrifices assembled and united the people.—Under the shield "of peace, the sacrifice, with the attendant banquet, was prepared; deliberations "were held, sentence passed, and traffic conducted: for which reason *Ting* the "old name of these conventions, means both sacrifice, banquet, diet, assize, "and fair."

In Sprenger's 'Life of Mohammad' is an ancient Musulman legend, of the first man, Adam, breaking faith with the angel of death; it concludes with this reflection or moral: —"The father of mankind is the father of de- "ception. God, therefore, ordered Man, through Seth, to make engagements "in writing, and to call witnesses, in order that they may not be broken—" The scope and purpose of the legend is, to typify and record the prevalence of bad faith, in all ages, and the necessity of legal precautions. Dr. Sprenger considers the myth to have emanated from Mohammed.

The distich of Sadi will occur to many;

یا وفا خود نبود در عالم
یا مگر کس درین زمانه نکرد

Good Faith, I ween, ne'er dwelt with Man,
Since first the world's career began!
Or, may-be, in these latter days,
Mankind eschew all honest ways!

living evidence of their uniform occurrence, wherever we trace a new or hidden primitive people. Combinations of good and evil, moral inconsistencies, are, in the annals of mankind, constantly met with: nobility of thought and purpose, united with brute propensities and debasing ignorance; gross superstition, with an earnest and moral simplicity of life and habit: and the jurisprudence of each people must necessarily vary with every class of characteristic peculiarities. The jurisprudence of Contract scarcely yields to that of Crime, in its subjection to those peculiarities, and is, on that account, most variable in its application and history. The strictness or laxity of a nation, in observance of the good faith of contract and reciprocal engagement, has ever been a test and criterion of its moral worth and title to respect from sister nations. Witness the familiar gibe, *Punica fides!* With the growth of commerce, the necessity, the general need (and value therefore) of good-faith, inevitably becomes more apparent; as well as the inconvenience of cumbrous forms or of superstitious ceremonial, in the conduct of trade and traffic, *i. e.* in contracting. Gradually, as the intrinsic worth of the conventional tie of contract forces itself (from any cause) upon a people's notice and conscience, the extrinsic ceremonial, the unwieldy harness of form, vanishes, by little and little, drops off, leaving only such dress and form as may suffice to attest the abstract mental as well as verbal undertaking. The obli-

gation of contract becomes then, merely, to use a Roman term, consensual, *i. e.* valued and enforced because of the *consensus* (mutual understanding), without more. (a)

Primitive manners have legalised private coercion to punish or repel deceit by a co-contractor: in analogy to the right of self-defence; the dishonest conscience being likened to the arm of violence.

The Hindu *Sastras* recognise five modes, as allowable to enforce a creditor's due, *viz.* "persuasion, suit-at-law, "artifice, worrying, force." (MANU) The XII tables of Rome subjected an adjudged debtor to a cruel discretionary power, *viz.*

"If he do not discharge his adjudged debt, and "no one offers to be his surety; the creditor may take "his debtor away with him, and may bind him with "straps or in fetters of iron of not more than 15 pounds' "weight, or less at pleasure——giving him a pound of "meal daily——If the bondsman fail to satisfy his creditor, "the latter may so keep him in chains for 60 days, pro-"ducing him before the assembled people three consecutive "ninth days, proclaiming for what sum he is indebted. If

(a) Thus it was in Rome. Beginning with the starch and tedious, but yet universal *nexus per æs at libram* (which had no character of grossness, if rude; it rather indicated the rarity and little value of what was typified, to the 'men of the lance,') and gradually fining down until the express abolition of *juris formulæ*, A. U. C. 1095. The intermediate resolution of the Prætor, in the famous edict, PACTA CONVENTA———SERVABO was a virtual abolition of Quirital despotism in matters of Contract; thenceforth, the moral tie of good-faith in observance or admission of conventions was no longer totally distinct from the legal obligation.

"there be several creditors, let them, after the third day "of proclamation, cut the bondsman up; nor does it "matter if the portions cut be more or less: or, if the "creditors prefer, let them export and sell him."

It is credibly attested, that no instance was known of a Roman creditor availing himself of the murderous license conferred in the last sentence: but, *ita lex scripta.*

Alienation.

Transfer of the position of proprietor, and of jural possession, are facts—such facts as, conventionally, according to each jural system, raise the jural conclusion of,—property, or possessory right having shifted, as the result of contract. In the logic of jurisprudence, no mere mental act, no evidence of will or agreement, not carried out by actual, potential or constructive delivery of the subject, works a change of ownership. A contract creates an obligation and a right; and, from the sale-bargain arises, not any real or positive relation with the subject agreed to be transferred, but a personal right to have the transfer made, a *jus ad rem.* The English 'feoffment' was a real transfer; so, the Roman *mancipatio;* inasmuch as each was something more than proof of intention, and included some act which symbolised actual delivery. So, with the English instruments and modes of conveyance or assurance: there, jural transfer, as a fact, is always superadded to the

contract, or mere declaration of intent; although the ancient notoriety and simplicity of alienations has been superseded by devices and by privacy, in adaptation (as was in Rome and always must be) to progressive wants and manners, to complication and variety of transactions among an intelligent, busy people. (a)

What is 'delivery' (actual, potential, or constructive), obviously hinges upon the idea of 'possession'—the taking or acquiring juridical possession. Savigny (b) ably sums up the *indicia*, the essentials of inchoate as well as continued possession in these significant maxims:

(a) The Mahommedan doctors, in their exposition of conventional dealings with Property, as in their definitions and handling of other civil Rights, affect a refined logical accuracy. Thus; *deyn* represents the Right acquired, by a party to a bargain, to have something set apart or appropriated to an expectant owner, and may be rendered, 'obligation,' (in relation to the party who has to render) or, 'claim,' (in relation to the recipient); whilst, *ayn*, means, a definite substance, and is the converse of *deyn*. From that distinction result four divisions of traffic, *viz.* *ayn* for *ayn (mokaizut)*; *deyn* for *deyn (surf)*; *deyn* for *ayn (sulum)*; *ayn* for *deyn*, which is the ordinary transaction, *viz.* goods for price.

Again, money, being in its nature indeterminate or fungible, is always *deyn*, *i. e.* a 'credit,' not a 'substance;' and, there are two arbitrary rules in the law of Islam, applicable to traffic, *viz.* 1. credit shall not be given for credit; 2. *reba*, excess, on receiving back a loan, is prohibited. (*Reba*, when applied to money, obviously is, interest, usury.) It follows, that, in *surf* bargains, *viz.* *deyn* for *deyn*, in order that the transaction be legal, "both the things" (to borrow Mr. Edmonstone Bayley's description) "exchanged should be delivered "and taken possession of before the separation of the parties, and, that, when "they are of the same kind, as, silver for silver, gold for gold, they should "also be exactly equal by weight." The formal requisites of the Mahommedan sale bear no slight analogy, for their strictness and significance, to the ancient Roman stipulation, the *obligatio verbis*.

(b) in his treatise on Possession. Sir Erskine Perry's translation has been used.

"1. Mere juridical events, which do not comprise an "act of prehension, give no Possession; *e. g.* acquisition "of an inheritance.

"2. If the conditions of acquisition occur, the Pos-"session is not excluded on juridical grounds of invalidity. "—According to this rule, Possession may be even ac-"quired through a criminal act—"

As to continuance:

"1. To enable the Possession to continue, there must be "a corporeal relation and *animus* [intention]. 2. If either "one or the other, or both together, cease, the Pos-"session is lost. 3. This rule stands in immediate logical "connection with the rule which defines the acquisition "of Possession."

With respect to the subject of the contract or sale remaining with the original owner, the vendor, and no personal or ostensible transfer taking place; this accident or circumstance Savigny considers, to create no dilemma or exception, should the intention clearly be, and be proved, that the transfer be considered jurally complete. For, that eminent jurist argues,—"whoever is in a con-"dition, generally, to acquire Possession for another by "his own acts, is not the less competent to do so, because "up to that moment, he, the agent, may have had juridi-"cal Possession of the subject." (a)

(a) Savigny quotes *The Digest*:—"*Quod meo nomine possideo, possum alieno nomine possidere; nec enim muto mihi causam Possessionis, sed desino possi-*

And Savigny goes on to show, that this change in the character of holding is consistently matter of agreement and understanding merely, as between the parties: he instances, "1. Whoever gives a thing as a gift, and at "the same time hires it, may not say any thing in "terms as to the Possession; but his intention is, that a "contract of hiring should immediately ensue between "himself and the donee; it is, therefore, a necessary "consequence, that the donee should be Possessor, and he "himself the occupant of another's Possession—

"2. The same thing happens with *ususfructus;* whoever, "therefore, gives away or sells an article, and retains the "*ususfructus* for himself, does, in fact, transfer the Pos- "session and the Property, and only proceeds to enjoy, "like any other fructuary, the Possession of another.

"3. If a thing is pledged, but at the same time the "use of it is permitted to the pledger, the Possession "[*i. e.* such possessory Right as belongs to a pledgee, "*antea* p. 61,] of the thing is thereupon acquired by "the creditor—

"4. In a general partnership, delivery of all the individual "goods is looked upon as made, directly that the contract "is completed——"

Still, the transfer (or its equivalent) and the contract are distinct. Together, they form the 'alienation.' The

dere, et alium possessorem ministerio meo facio: nec idem est, possidere, et alieno nomine possidere. Nam possidet cujus nomine possidetur. Procurator alienæ possessioni præstat ministerium." (CELSUS)

transfer may be other than actual and corporeal or physical, *i. e.* where express contract, or usage, or the necessity of the case (as in commercial cö-partnership) justifies a substitution of the *animus* for the act, in other words, substitutes the declaration, that Possession *has* passed, for a physical changing of hands—the will for the deed. The case is exceptional, and requires, in each instance, to be accounted for. (a)

Savigny sums up the entire problem of acquisition through foreign agency, *i. e.* excluding personal interference of the acquirer, in the question:—"How is it possible

(*a*) This exceptional mode of possessing is familiar to jurists under a somewhat barbarous name, *constitutum possessorium.* Lindley, in a note to his translation of Thibaut's *Pandekten Rechts, scil.* the text defining what this mode or Right is, says, the doctrine is wholly denied by several jurists, and is termed by one 'a monstrous offspring of practice.' Savigny merely insists, that a *constitutum* is not to be presumed.

English commerce, the Law-Merchant, has introduced a laxity, which varies, not the juridical rule, but its application.

"In Scotland [as was in Rome], 'property' is not transferred, either nominally "or effectually, without delivery of the commodity—" (*Bell's Commentaries*): in English law, however, the sale of a specific subject, where nothing remains to be done by the seller before it is to be delivered, passes the property in the subject to the purchaser, without delivery. In the words of Lord Wensleydale, "—property does not pass until there is a bargain with respect to a "specific article, and every thing is done which, according to the intention of "the parties to the bargain, was necessary to transfer the property in it."

In effect, the English law treats the fact (or legal inference) of appropriation (to which possessory remedies are attached) as equivalent to, or as constructive delivery; whilst the Scottish law requires, that the purchaser be put in the position of the seller, and that the sort of dominion and control, whatever it be, that the latter had, be transferred—nothing less.

So that, the difficulty in doubtful English cases practically resolves itself (the contract being assumed) into one of two questions—was there appropriation? or, was there delivery? In Scotch cases, the last question alone is material.

"to acquire through the acts of another party the consci-
"ousness of physical dominion over a subject?"

The idea of such physical dominion may be well typified or instanced in the obtaining title to a possessory remedy against a stranger who has dispossessed the agent: such a Right is a juridical equivalent of the essential 'corporeal relation.' (a)

Here may be noted an ambiguous Right, *hypothēca* (a subjecting, burdening—), known as 'mortgage;' found in most systems, and treated as a *quasi* alienation, but owing its value less to the classification usually (and in English law correctly) assigned to it, among *jura in re*, than to the adjudication, under which the Law supplies the defect of facts, *scil.* transfer or disposing power, in order to perfect and carry out the conventional and substantial character of the transaction, *viz.* as a pledge, *pignus.*

(*a*) The above considerations of ideal or conventional, in lieu of actual and corporeal transfer—the former being necessarily, as a rule, unpublished, not ostensible, secret—are of-course wholly irrespective of those exceptional Rights or privileges, sometimes granted to creditors, to demand annulment or disregard of such transfer, as being a breach of commercial faith, lessening, in an unfair and deceptive mode, the available assets of a debtor. Such special provisions have no bearing upon the principles governing the idea of jural possession.

EIGHTH SECTION

NATURAL TIES: MARRIAGE

We have yet, but adverted to those relations which, while they constitute primary society, are the basis and furnish the material of political society [(a)]; *viz.* the Marital or Conjugal, the Paternal and Parental, the Filial—bonds of Nature's immediate ordinance, inevitable, instinctive.

Out of those several relations, civil and legal obligations necessarily arise; each relation confers or implies civil Rights and duties: nor does any chapter of a Nation's Law more indicate the national bent and characteristics, the moral and religious standard of the national conscience.

The obligations arising out of the relations now treated of, are a distinct head of jurisprudence, of jural rights and duties—at all events, a subdivision. True, they may be distributed, as obligations 'by law,' and 'by contract.' But, they have a separate and distinct incident, *viz.* their inherent, natural, *præ*-civil existence, their intrinsic and independent moral character. For, whatever artificial and political attributes the policy or requirements of particular

(a) The immediate and normal origin of civil or political society was, doubtless, protection from external aggression.

civil communities may clothe those relations with, (a) it is undoubted, that the social conduct and duties of husbands, fathers, sons and brothers, as such, are invariably noticed in, enter into the spirit and composition of every system of laws, and are, moreover, always defined and interpreted in precise conformity with the estimate and ideas of each Nation as to what that conduct ought, morally or religiously, to be. The precise acts required from or justified in a good father, in a good son, often differ with different people: but the quality of goodness, as of badness, is ever measured and ascertained, plainly, by 'the Moral sense,' without artificial element or bias—unless indeed the influence of religious or of *quasi*-religious dogmas be considered an artificial element.

Marriage is (or, more strictly, is the result of) a contract, inasmuch as it implies or pre-supposes union of wills—but, it is something more: it is, in origin and significance, closely analogous to Property.

As Property is, in some way, a necessity, an inevitable result; so, Marriage, *scil.* a rule of sexual intercourse, an ordinance for preservation of infant life, for education (in a comprehensive sense), is, no less, a necessity.

(a) *e. g.* the Roman *familia,* where all social and natural feeling succumbed to the *potestas:* yet this was but an artificial adaptation and construction of Nature's ordinance, a recognition of the *imperium* of paternity—enforcing its responsibilities to the utmost.

"Among civilized nations, the father is that person on "whom the laws, by the ceremony of marriage, have "fixed this duty; because they find in him the man they "want. Amongst brutes, this is an obligation which the "mother can generally perform; but it is much more "extensive amongst men. Their children indeed have "reason; but this comes only by slow degrees. It is not "sufficient to nourish them; they can already live; but "they cannot govern themselves. Illicit conjunctions con- "tribute but little to the propagation of the species. The "father, who is under a natural obligation to nourish and "educate his children, is not then fixed; and the mother, "with whom the obligation remains, finds a thousand "obstacles, from shame, remorse, the constraint of her "sex and the rigour of laws; and besides, she generally "wants the means." (a)

As human Reason modifies, extends, refines upon the general rule, the indefinite necessity of 'property'; so, do we find the simple idea of 'marriage' added to and adapted to the wants, the temptations, the habits of various races, in the political union of each.

Monogamy, polygamy, *jus connubii* (implying the existence of disabilities to contract marriage); dotal rights, marital supremacy (absolute or qualified), divorce and its causes—these are heads or titles which indicate

(a) MONTESQUIEU

civil-law rules of marriage-union, varying according to national views and advancement.

With respect to marriage rites; Professor Ortolan's account [a] of their significance and fluctuation in the Roman State, well illustrates their juridical character, *viz.*

"Marriage, being one of the most important acts of "man's life, has naturally, among all nations, been placed "under protection of a higher power, and been associated "with invocation of Divinity. And so it was with the "Romans; in order to celebrate the rite, their gods were "called to intervene; and, when Christianity became the "State-religion, it was of-course that marriage should be "sanctified by christian ceremonies. At every period, how- "ever, and under Justinian, this sort of intervention was "purely religious, and had no legal character; nor was "marriage considered other than a civil contract. A long "while elapsed ere the church [by which here is meant "the Romish hierarchy] assumed to have the exclusive "control of this contract, giving it the name of a sacra- "ment.[b] Marriage had not been subjected to the obser- "vance of any solemnity. The Romans had not given its "celebration the importance of an official public proceed-

(*a*) *Explication Historique des Instituts.*

(*b*) Such it necessarily is with the Hindus; *grihi*, married householder, being an essential grade with each of the casts: it is the only one of the four orders or grades competent to a *Súdra*, and by which the universal birth-taint is removed.

"ing (such, for instance, as adoption and testamentary "succession) requiring concurrence of the community: they "left this contract to be dealt with as a mere private "matter."

In Scotland,—"A promise of marriage in writing, or "admitted on reference to oath, although not of itself "marriage, nor a binding engagement to ground an action "for implement, is marriage (*ipsum matrimonium*), "when followed by sexual intercourse; and as effectually "as a regular marriage *in facie ecclesiæ* unites the par-"ties as husband and wife." (a)

Wherever, as in all jural contracts, a particular form or rite is prescribed for marriage, as a condition of it being recognised and sanctioned by Law; then, of-course, (and then only) the prescribed solemnity is indispensable: *e. g.* to an English marriage, formerly co-operation of a clerk in orders, and now (b) the substituted registry.

The Hindu *Sastras* ingeniously adapt requirement to circumstances: *bráhma, prájápatya* or *káya*, and *daiva* are simple though solemn modes of receiving a bride from her father, the latter through the intervention of a priest and religious forms; *ársha* where gift of the damsel is preceded by a certain offering to the father,

(a) Bell's Principles. (b) 14 & 15 VIC. C. XL

scil. a pair of kine; *ásura,* where the father and relatives of the bride are conciliated by considerable presents, in proportion to the bridegroom's means; *gándharva,* when the union is what in Europe is called, a love-match; *rákshasa,* capture of a maiden in war; *paisácha,* where a man by stratagem succeeds in possessing himself of the person of the woman of his choice. These are described, "eight forms of the nuptial ceremony used by the four classes, some good and "some bad in this world and in the next." And, "— "the ceremonies of *paisácha* and *ásura* must never be "performed." And, "Some consider the four first only "as approved in the case of a priest; one, *rákshasa,* as "peculiar to a soldier; and that of *ásura,* to a mer-"cantile and a servile man." (a)

(a) MANU, ch. 3.

Gift of or legal possession of the woman, as a bride, is the substance of and constitutes Hindu marriage. But, no mode dispenses with *i. e.* is regular and formally complete, without ceremonial, *scil.* the *homa,* fire-oblation, and the seven steps in seven circles, by the married pair.

(See Shamachurn Sircar's *Vyavastha-Darpana*)

With the Romans, the idiomatic expression for marrying, *uxorem ducere,* marks what was essential, *viz.* tradition; and this was accomplished in accordance with the general law of property, insomuch that *usus i. e.* possession of a woman's person, for a year, entailed the general result, *viz.* prescriptive Right, and produced or rather constituted, if so desired, *justæ nuptiæ.* "*Usu in manum conveniebat, quæ anno continuo nupta perseverabat: nam "velut annuá possessione usucapiebatur, in familiam viri transibat, filiæque "locum obtinebat.*" GAIUS

Mr. Spence in his '*Inquiry into the origin of the Laws and Political institutions of modern Europe*' thus speaks of the marriages of the nations of central Europe: "Among the Anglo-Saxons, though marriage was treated as

Dr. Hoffman ably epitomizes the natural and jural institution of marriage (a) —

"To ensure the duration of a species so noble in its "powers of intellect, and in its capacity of happiness, na- "ture has endued the two sexes with a physical inclination "for each other. But in order that this inclination shall "be controlled within such bounds as will ensure the pro- "pagation of the species, she has chastened it with a moral

"a purchase of the female from her legal guardians, she could not be married "against her consent. The contract of espousals (amongst all the Barbarians) "was made and completed with the guardian, by the intended husband paying, "or agreeing to pay to the guardian, as the nuptial price of the female, a cer- "tain sum in money, or in valuables, for the benefit of the guardian, or of "him and such other relations of the female as were by law entitled to "receive it.—The severest penalties were pronounced against either husband "or wife, who married without having properly completed the ceremony of "espousals—In most of the Barbarian nations, after the nuptial price was "paid, the intended husband was bound to bestow on or secure to his wife a "certain portion of property by way of dower.—The wife in general became "entitled to the enjoyment of her dower from the time of her marriage.— "The espousals being completed, and the dower properly constituted or secured, "the parties proceeded to solemnization. This was performed with much pomp "and parade, &c. &c. Most of these ceremonies will be recognized as of Ro- "man original.—Among the Barbarians, the early codes mention nothing of "ecclesiastical benediction in the celebration of marriage.—By marriage con- "cluded in the manner above-described, the guardianship, *mandium*, of the "wife, was transferred from the parents or relations to the husband, and the wo- "man became subject to the law of her husband. Marriage, however, amongst "the Francs, was a species of partnership, in which each had their separate "rights.—The marriage state was considered most sacred; the intruder on its "rights, the offending wife, and accomplices, might be put to death by the "husband in the heat of his rage with impunity, or they might be claimed "by him as slaves—The Lombards even permitted a slave to take immediate "vengeance on a freeman. The female who was willingly a party to the in- "fidelity of a husband was delivered as a slave to the wife.—"

(a) *Legal Outlines.*

"sentiment of love and esteem, very different from the "emotion to which we have alluded, and much more dura- "ble, and also with a most tender affection for the mutual "offspring. This esteem, however, can neither be perpe- "tuated without constancy to each other, nor can the issue "be so certain or so tenderly beloved, unless promiscuous "intercourse be restrained. It is on these principles that "matrimony has been always regarded as essential to "man's happiness; and is the necessary offspring of asso- "ciation, or primitive society, as it is also the first care "of civil and religious institutions.—This is the most "important relation of primary society; and it must have "subsisted before civil associations and positive laws, be- "cause it is a relation suggested by our nature, and the "very first circumstances under which man is placed after "his maturity. Hence Rutherforth defines marriage to be; "'A contract between a man and a woman, in which, by "their mutual consent, each acquires a right in the person "of the other, for the purposes of their mutual happiness, "and of the production and education of children.' This, "it is evident enough, may as well be made in primary, "as in civil society: the motives, the ends, the affections "are the same in both; and though positive laws may "put restraints of various kinds on the making of the "contract, or as to its termination, and enact many rules "in regard to the conduct of the parties, it is not the less "a relation of mere primary society."

Jural obligations and Rights incident or proper to the marriage relation divide themselves into, 1. conjugal Rights, *scil.* the *consortium, concubitus,* personal intercourse, which is the cause and immediate purpose of the contract, 2. the changes effected, by the marriage relation, in pre-existent or supervenient absolute rights, *e. g.* of property, 3. personal obligations other than the *consortium.*

In the Mahommedan *Sheraa* we find. "—the husband "has no power to restrain his wife from going on a jour- "ney, or from going abroad, or visiting her friends, until "such time as he shall have discharged the whole of "the *muhr modjil* or prompt dower; because a husband's "right to confine his wife at home is solely for the sake "of securing to himself the enjoyment of her person, "and his right to such enjoyment does not exist until "after the payment of the return for it." and,—

"If a man have two or more wives, being all free "women, it is incumbent upon him to make an equal "partition of his cohabitation among them.—" (a)

In the *Sastra* of the Hindu;

"Him to whom a woman's father has given her, or "her brother with the paternal assent, let her obsequi-

(a) *Hedaya*

"ously honour, while he lives; and when he dies, let "her never neglect him." and,

"Though unobservant of approved usages, or enamoured "of another woman, or devoid of good qualities, yet a "husband must constantly be revered as a god by a "virtuous wife." (a)

"Married women must be honoured and adorned by "their fathers and brethren, by their husbands, and by "the brethren of their husbands.—" (b)

"No atonement is ordained for that man who forsakes "his own wife, through delusion of mind, deserting her "illegally—" (c)

In the French code:

"The wife is obliged to live with her husband, and "to follow him wherever he may think proper to dwell: "the husband is bound to receive her, and to furnish her "with everything necessary for the purposes of life, ac-"cording to his means and condition."

Such are modes of viewing and dealing with the primary matrimonial right, the *consortium*.

With regard to property, the English *feme-covert* or wife is absorbed, and loses her individuality.(d) All that

(a) MANU ch. 5. (b) *ibid.* ch. 3. (c) DEVALA

(d) The feudal indulgence of Dower, '*ad sustentationem uxoris et educationem liberorum*,'—the wife's 'equity to a settlement' (this being the price of a dis-

she owns, all that comes to her, all that she earns, passes to the husband. She cannot contract, save as his representative.

The English husband, who is lord of his wife's lands or Realty (without disposing power) during the marriage, *viz.* their joint lives, becomes, by birth of issue, a life-tenant, should he survive, *scil.* 'Tenant by the curtesy of England.'

A Hindu wife may have exceptional *i. e.* peculiar and private property, *stri-dhana.* "A husband need not return "to his wife *stri-dhana* appropriated by him during a "famine, or in order to perform sacred rites, or when "suffering from disease, or when in prison." (a)

The laws of France admit great latitude in the marriage contract as to the effect of the union upon the possessions and proprietary Rights of the husband and

cretionary remedy), can, neither, be said to infringe the Common-law status of the wife. (The Right of dower may now be barred upon any acquisition of the husband.) The policy of English Equity is in aid and protection of the wife against an unreasonable exercise of marital power. But—"So completely is "a *feme-covert* disabled from holding or recovering property during coverture in "her own right, that if a woman possesses personal property, marries and settles "it upon herself without the intervention of a trustee, the husband is, *in law*, the "absolute owner of the property. So, the property in wearing apparel, bought "by the wife for herself whilst living with her husband, out of money settled "to her separate use before marriage, and paid to her by the trustees of her set-"tlement, vests by law in the husband and is liable to be taken in execution "for his debts. And the savings of the wife, whilst separated by agreement "from her husband, out of a weekly sum allowed by him for her support, may, "after her death, be recovered, in an action for money lent, at his suit, from "one to whom, shortly before her death, they had been disposed of by the "wife by way of gift." BROOM, *Commentaries, C. L.*

(a) YAJNAVALKYA

wife respectively; but prohibit any stipulations that may "derogate either from the rights resulting from "the power of the husband over the person of his wife "and children, or those which appertain to the husband "as head.—"

With the Musulmans, union or confusion of property is no incident of marriage; which is, itself, but a *quasi* sale of the wife's person.

But little need be added upon the third head, *viz.* personal obligations of the matrimonial tie, other than the simple *consortium.* Some such obligations are inevitable incidents in every system, and have been already referred to; they may relate to all belonging to or affecting the spouses, respectively, as well as to whatever may affect their off-spring: they are framed in accordance with the policy or character of each system; seldom however deviating materially from the suggestive moral and physical laws, which award power and protection to the male partner,[(a)] nurture, domestic and subordinate cares to the wife. Lord Chancellor Bacon, in his 'Essays, civil and moral' quaintly observes:—"certainly, wife and children "are a kind of discipline of humanity; and single men, "though they be many times more charitable because "their means are less exhaust, yet, on the other side,

(*a*) That male animal superiority is not absolutely universal, the male falcon, the drone bee, the male spider, and some others of the lower creation fully testify.

"they are more cruel and hardhearted, (good to make "severe inquisitors,) because their tenderness is not so "oft called upon."—"Wives are young men's mistresses; "companions for middle age; and old men's nurses—"

Parentage.

Of more immediate political and jural significance is, the Parental tie.

"Let the law of life and death be with a father over "children born to him in marriage, also power to sell "them into servitude!" (XII Tables)

Of the Scandinavians, the historian Geijer writes:

"As with the Greeks and Romans, and among all pagans, "the father was free either to expose or bring up a new-born "child; in the latter case he raised it from the earth in "his arms, and had it sprinkled with water and named "in the presence of his chief kinsmen."

"The vital and universally operating principle of the "Chinese government" (writes Sir Geo. Staunton (a)) "is, "the duty of submission to parental authority, whether "vested in the parents themselves, or in their representa-"tives; and which, although usually described under the "pleasing appellation of filial piety, is much more properly

(a) Preface to *Ta-tsing-leu-lee.*

"to be considered as a general rule of action, than as the "expression of any particular sentiment of affection. It "may easily be traced even in the earliest of their "records; it is inculcated with the greatest force in the "writings of the first of their philosophers and legisla-"tors; it has survived each successive dynasty, and all "the various changes and revolutions which the State "has undergone: and it continues to this day power-"fully enforced, both by positive laws and by public "opinion. A government, constituted upon the basis of "parental authority, thus highly estimated and extensive-"ly applied, has certainly the advantage of being directly "sanctioned by the immutable and ever-operating laws "of Nature——" and, "By such principles the Chinese "have been distinguished ever since their first existence "as a nation; by such ties, the vast and encreasing "population of China is still united as one people, sub-"ject to one supreme government, and uniform in its "habits, manners, and language."

In the Jewish code (a) we find:—

"If a man have a stubborn and rebellious son, which will "not obey the voice of his father or the voice of his mother, "and that, when they have chastened him will not hear-"ken unto them; then shall his father and his mother lay "hold on him and bring him out unto the elders of his city,

(a) *Deuteronomy*, ch. xxi.

"and unto the gate of his place; and they shall say unto "the elders of his city, this our son is stubborn and rebelli- "ous, he will not obey our voice; he is a glutton and a "drunkard, and all the men of his city shall stone him "with stones, that he die."

Referring to the subject condition of the most favored of sons, the Christian apostle (a Jew) wrote: "—the heir "as long as he is a child, differeth nothing from a servant, "though he be lord of all; but is under tutors and "governors, until the time appointed of the father."

And, in the *Dharma Sastra* of the Hindu, it is declared:—

"That pain and care which a mother and father "undergo in producing and rearing children, cannot be "compensated in 100 years." MANU, c. 2, sl. 227.

"Him, by whom he was invested with the sacrificial "thread, him, who explained the *Veda* or even a part of "it, his mother, and his father natural or spiritual, let "him never oppose." c. 4, sl. 162.

"A wife, a son, a servant, a pupil, and a younger whole "brother, may be corrected, when they commit faults, "with a rope or the small shoot of a cane." c. 8, sl. "299.

"A mother, a father, a wife, and a son shall not be "forsaken; he who forsakes either of them, unless guilty "of a deadly sin, shall pay 600 *panas* as a fine to the "king." c. 8, sl. 389.

"Let the father alone support his son; and the first-"born, his younger brothers; and let them behave to "the eldest, according to law, as children to their father." " c. 9, sl. 108.

Thus have varying stages and types of civilization, according to the policy of each jural scheme, recognized and dealt with the necessity and law of domestic government, parental superiority and responsibility, the obligations of the filial relation. No relation or tie is so inevitable, so indelible, so influential. It is the base and the pattern of all civil government: on the father's side, the symbol, as the source, of power, of authority; on the mother's, the spring, the centre, the preserver of the most ennobling, the most universal, the most enduring virtues and affections.

Adoption.

Sentiments of religious, social or civil convenience (according as the basis and policy of 'the family' may be) have introduced an artificial paternity, where no natural successor and substitute in the Body-politic existed.

"Adoption," says professor Hermann, of the Athenians, "was, moreover, not considered as a mere right, but as "a duty which, if omitted by the childless person, was "usually performed after his death by his nearest relatives,

"lest his race and its peculiar '*sacra*' should become "extinct, a circumstance to which the State itself was "by no means indifferent. For the same reasons, the "adopted person could not return into the family of his "natural father to inherit his property, unless he could leave "offspring of his own in that of his adopter; if he were "childless he could not be re-adopted, and the property "lapsed to the collateral relatives." (Street)

It is almost needless to refer to the stereotyped laws and usages, in this respect as in others, of the Hindu. The *dattaca* (gift-)son is a religious necessity: a son-less Hindu is, with the orthodox, an object of pity. (a)

Delegation of parental authority and care is often a moral and necessary act, *e. g.* to a teacher: even permanent transfer of that authority and care may be consistent with the paramount charge of a parent, *viz.* the welfare of his child, and therefore inevitably recognised and permitted (though rarely, and only as a penal measure enforced) by every rational system of laws. Those considerations, however, do not include the jural relation of 'adoption': this relation is foreign to English jurisprudence; in the French code it occupies a chapter, but modified or treated in a peculiar and exceptional way, *e. g.*

(a) The *Sastras* describe twelve sorts of "sons," *i. e.* lineal or quasi-lineal representatives entitled, as such, to present the death-oblations and to inherit. *Dattaca Putro* is the generic and customary description, in this Iron Age, for one adopted.

Art. 343. "Adoption is not permitted but to persons of "either sex, upwards of fifty years of age, who shall not "have, at the time of adoption, legitimate children, or "descendants, and who shall be at least fifteen years older "than the persons whom they propose to adopt."

Art. 345. "The power of adopting can be exercised "only in favor of an individual to whom, during his "minority and for six years at the least, the party "adopting shall have furnished assistance and bestowed "unremitting care, or in favor of one who shall have "saved the life of the adopter, either in battle, or by "rescuing him from the flames or the waters."

Wardship.

This too is a jural relation of which paternity is the prototype and original. Not only children, but others may need, that the State, the general and political parent of an entire people, furnish a substitute for paternal care. An able exposition of 'The sphere and duties of Government' thus deals with this function of State:—

"—To begin with children, who constitute the largest "and most important class of such persons [*scil.* wholly "deprived of Reason, or in whom it has not reached "maturity], it is evident that the care for their wel-"fare, in virtue of the principles of right, peculiarly "belongs to certain persons, that is, their parents. It is

"their duty to train up their offspring to perfect maturity; and from this duty, and as the necessary conditions "of its exercise, flow all their rights with regard to them. "The children, therefore, retain all their original rights "as regards their life, their health, their fortune (if they "already possess any), and should not be limited even "in their freedom, except in so far as the parents may "think necessary, partly for their own development, and "partly to preserve the newly-arisen domestic relations, "while such limitations should not extend beyond the "time required for their training. ——

"It would, therefore, appear to be neither just nor "advisable to require parents to be continually rendering "account of their conduct towards their children; they "must be trusted not to neglect the discharge of a duty "which lies so near to their hearts; and only in cases "where actual neglect of this responsibility has occurred, "or where it may be immediately apprehended, has the "State any right to intermeddle with these domestic relations. To whose care the superintendence of the children's training must fall, after the death of the parents, "is not so clearly determined by the principles of natural "right. Thence, it becomes the duty of the State to "decide distinctly on which of the kinsmen the guardianship is to devolve; or, if none of these should be "in a condition to undertake the discharge of this duty, "to declare how one of the other citizens may be chosen

"for the trust. It must likewise determine what are the "necessary qualifications for guardianship. Since the guar- "dians appointed undertake all the duties which belong- "ed to the parents, they also enter on all their accom- "panying rights; but as, in any case, they do not stand "in so close a relationship to their wards, they cannot lay "claim to an equal degree of confidence, and the State "must therefore double its vigilance with regard to the "performance of their duties. ——

"What we have here observed respecting minors, applies "also to the provisions to be made in the case of idiots "and madmen. The difference chiefly consists in this, "that these do not require education and training (unless "we apply this name to the efforts made to restore them "to the use of their reason), but only care and super- "vision; that in their case, moreover, it is principally "the injury they might do to others which is to be "prevented, and that they are generally in a condition "which forbids the enjoyment either of their personal "powers or fortunes. It is only necessary to observe, "with regard to these, that as the return to Reason is "yet possible, the temporary exercise of their rights is "all that should be taken from them, and not those "rights themselves." *(a)*

The lament of Hector's widow over the fate of her

(a) Baron WILHELM VON HUMBOLDT, (Coulthard).

orphan son speaks but ill for State-care of even noble minors among the Homeric nations:—

"The day, that to the shades the father sends,
"Robs the sad orphan of his father's friends:
"He, wretched outcast of mankind! appears
"For ever sad, for ever bath'd in tears!
"Amongst the happy, unregarded, he
"Hangs on the robe, or trembles at the knee;
"While those his father's former bounty fed,
"Nor reach the goblet, nor divide the bread!
"The kindest but his present wants allay,
"To leave him wretched the succeeding day:
"Frugal compassion! Heedless they who boast
"Both parents still, nor feel what he has lost,
"Shall cry,—Begone! thy father feasts not here—
"The wretch obeys, retiring with a tear." (*a*)

Females have been often, merely because of sex, classed among the helpless (or, may be, the unsafe,) who need *tutela*, guardianship. This is emphatically so with the Hindus:

"In childhood must a female be dependent on her "father; in youth on her husband; her lord being "dead, on her sons; if she have no sons, on the near "kinsmen of her husband; if he left no kinsmen, on "those of her father: if she have no paternal kinsmen,

(*a*) The old feudal wardship is not referred to; as it was a merely arbitrary and artificial institution. As observed by Chief Baron Gilbert (*Common Pleas*) "—wardship in the feudal law was of another nature, for the guardian had "the whole profits in the estate, and also the marriage of the infant, which "was in order to bring him up to arms, and to marry such persons, as they "thought might continue the martial strain, that so the ward might subserve "the original design of the tenure."

"on the sovereign: a woman must never seek inde-
"pendence." MANU (a)

Among the Athenians, "Women were, in fact, throughout "their life in a state of nonage, and could not be parties "to any act of importance without the concurrence of "their guardians, whose place the husband naturally "supplied during his life-time." (b)

NINTH SECTION

FAULTS: OFFENCES: CRIMES

It has been noted what class of municipal laws are 'criminal,' and what 'civil;' also, that an illegal act may

(a) with the gloss of Calluca Bhatta.

(b) HERMANN, *Political Antiquities of Greece*, (Street).

Concurrence, *auctoritas* of a tutor, in Roman law, was characteristic and singular in its import and results; "Ces expressions de *auctor fieri, auc-* "*toritatem præstare*, ont été employées, dès l'epoque même des xii. Tables "pour designer l'action du tuteur intervenant dans les actes que le pupille a "besoin de faire, s'adjoignant à la personne de ce pupille afin de la compléter "(*personae, non rei vel causae datur*), et se portant, avec lui, *auctor*, "c'est-à-dire cause déterminante, cause efficiente de l'acte en question. *Auctori-* "*tas*, on le voit, n'exprime pas une simple autorisation, comme nous l'enten- "dons aujourd'hui, encore moins une ratification; mais bien un concours, une "participation active du tuteur dans l'acte même (*in ipso negotio*), un pou- "voir générateur; *Auctorne fis*? lui demande-t-on, et il répond; *Auctor* "*fio*." ORTOLAN

subject the aggressor to be pursued doubly, both as a civil and a criminal offender. The distinction is in the remedy, rather than in the character of faults or offences. But there are, there must be, intrinsic, fundamental differences in the very nature of offences; they must, in their inherent properties, admit of classification.

"Loss and damage may arise to a person, either from "some mere casualty *(casus)*, or from some overruling "power *(vis major)* which man is helpless either to "foresee or to ward—also, from some act, or from some "omission of another person. None is responsible, unless "by express engagement, for mere casualty or for the agency "of overruling power. It is for him who owns a right, "whether a proprietary or a personal claim, to suffer from "casual accidents or irresistible force which may invade his "right; in colloquial phrase, to 'run the risk.' As respects "the acts or the omissions of another; if that other, in "such act or omission, has but exercised his Right, he is "not responsible for it to any person. '*Non videtur vim "facere, qui suo jure utitur.*' (Dig.) But, if the acts or "the omissions be illicit, they may or may not, according "to circumstances, be imputable; that is to say, of a character "to be put to the charge of the author, and to cast upon "him the civil obligation of repairing the consequences.

"Illicit acts, that is to say, such as infringe the law "*(injuria)*, are prejudicial to another, and are imputable

"to their author,—divide themselves into, *dolus* and *culpa.* "*Dolus* is, when the act has been with design to harm, "by a person possessed of reason and of liberty; *culpa,* "when the act has been without any design to harm." ORTOLAN

Culpa, which excludes malice and design to harm, and therefore mental or positive criminality, has been variously instanced (*supra* p. 41) in illustration of the strict good faith due from every member of a civil community. *Culpa* or fault, culpability, of-course admits of degrees, from the deepest to the most trivial shade of error of conduct. Every inconsiderate act and neglect, all avoidable doing as well as not-doing which is cause of evil, is culpable, and, if cause of civil wrong, civilly imputable.

Dolus, as that mental adjunct or motive to action, which distinguishes from *culpa,* is defined in The Digest, "every cunning, deception, contrivance, practised to circum-"vent, to deceive, to take in another." (a)

The intent, not the result, is here considered—the false mind.

The division, *dolus—culpa,* is by no means conterminous with the distinction, in any system, of 'criminal law' and 'civil law': the proper, intrinsic test of this distinction being, the difference of pursuit and of sanc-

(a) Omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita. ULPIAN

tion; *viz.* in the one, Punishment, infliction, retribution, for such illegal act or neglect as may be hurtful, prejudicial to the union, the integrity, the dignity of the Body-politic, the State, the collective people, (*i. e.* really prejudicial or assumed to be so,)—a Public wrong; in the other, compulsory Reparation of, making good, loss occasioned by illegal act or neglect, *scil.* Private wrong. (a)

Moralists as well as jurists (b) differ in describing the aim and office of criminal legislation.

(*a*) The distinction is marked and illustrated in the French system:

"L'action pour l'application des peines n'appartiont qu' aux fonction-"naires auxquels elle est confiée par la loi. L'action en reparation du "dommage causé par un crime, par un délit ou par une contravention, peut "être exercée par tous ceux qui ont souffert de ce dommage."

Code d'Instruction Criminelle.

"L'infraction que les lois punissont des peines de police est une 'contra-"vention.' L'infraction que les lois punissent de peines correctionnelles est "un 'delit.' L'infraction que les lois punissent d'une peine afflictive ou in-"famante est un 'crime.' *Code Pénal.*

A French jurist, M. Rogron, thus apologetically preludes a commentary upon the portion of their Penal Code relating to theft and other violations of property:—"La vie ne serait souvent qu' un pénible fardeau, dépouillée des "jouissances que les biens de la terre nous procurent. Lorsque ces biens sont "devenus le prix de nos sueurs, et la récompense de notre industrie, ils ne "peuvent plus, même dans l'état naturel, nous etre enlevés sans révolter en "nous les sentiments de la justice primitive: dans l'état civil, cette soustraction "frauduleuse ou violente de ce que la loi nous garantit comme notre propriété, "est encore plus coupable, parcequ' elle ne blesse plus seulement un intérêt "individuel. En effet, c'est principalement pour assurer à chacun ce qui lui "appartient, que la société a été établie, et que les citoyens se sont astreints "à des sacrifices mutuels; il s'ensuit que toute atteinte aux droits de propriété "blesse la société toute entière, qui a dû dès-lors réprimer ces sortes d'attentats "par des peines qui impriment dans le cœur de ceux qui seraient tentés de "violer ces droits sacrés, une juste terreur."

(*b*) An American judge, Hurlbut, has published some enlightened (not the less so because heterodox) views of the State-office of Punisher *(Human Rights*

Moreover, history exhibits a multifarious, if not capricious intermingling of Crime, *i. e. punishable* misconduct, with private pursuit of *compensation* for result of misconduct.

The State avenges contempt of the Law of the Land, associates 'crime' with something to be dreaded by the most hardened, varies classification and visitation of public wrongs with varying circumstances, temptations, dangers, popular delusions, popular vices.

It follows, that, Criminal *i. e.* Penal laws necessarily and immediately depict or typify the moral progress and defects of the nation: they hold up to obloquy those sins and infractions of right which they are specially framed to ward off and condemn; thus, teaching and warning. Not that it is the office or purpose of a Penal Code to teach; any more than it is, of any other branch of human law or rules of human conduct enforced by human agency. Organised control cannot but furnish lessons and practical exhortation.

and their Political Guarantees). Speaking of the public offender, he says: — "By his offence he forfeits no rights whatever, but only incurs a limitation, "a restraint of his enjoyment of them so long as the public safety may re-"quire—" and "—the whole power of Society [the State] is exhausted when "they have secured themselves from further harm from an offender—"

This view is irrespective of claim by victims or sufferers *e. g.* dependents of one slain, to whatever satisfaction or compensation is possible and reasonable. The political and moral difficulty lies in the question—whether and how shall the State, by means, by terror of its Sanctions, repress, diminish, stay the spread of crime? They who think with the American judge, seem to ignore any such duty as within the province of jurisprudence, or of penal legislation.

The motive and direct object of Law, criminal and civil, is; to hold together, to preserve the civil union, the commonwealth—to discharge the trust of 'government.' In aid of that discharge, whatever may raise the standard of a people's conduct must help. The schoolmaster, the moral or religious preacher, the purveyor of popular literature—these are servants and pioneers of progress; they index, as well as influence proneness to, immunity from certain modes of wrong-doing; to them and to their fellow-labourers, in the field of national mind and impulse, are chiefly due the merit and demerit of the nation's criminal statistics, the normal rectitude, or the moral deflexity (as may be) of their pupils, hearers and readers. The teacher, the mental, the moral guide (under whatever guise or by whatever name, *e. g.* as novelist or as lecturer or as ballad-writer, he reach the public sense,) deals out motives and objects, gives a standard and rule to the wandering or wavering will, undermines and supplants where he may not cultivate. Herein is the Education of a people; a problem, obviously by no means identified with the advancement of learning or of science: although there is much of mutual dependence of each upon the other.

In the abstract idea of Sanction (*scil.* punishment, penalty, execution) is included a notion of revenge, of retaliation, of *quid pro quo*, conjoined with thought of precaution and of prevention. Philosophy, reflection, enlightened experience, modify, organize, expand, re-distribute the compo-

nent parts of the idea. Hence, the jural classification and heads, Crimes—Torts, with their relations and subdivisions, in each system: the word 'tort' we take from technical English law-nomenclature, because more significant as well as distinctive than its synonyme, private wrongs. (a)

(a) In Heeren's *Reflections on the Politics of Ancient Greece*, is a succinct account of the Athenian system; "—prescription for the most part determined "what was a crime against the public, and what was but a private concern. But "what had once been established by prescription, was ever after valid as a law. "Yet who can discover all the causes, perhaps frequently accidental, by which "various suits came to be considered in one age or another, as affairs of the "public?—it was firmly established, which processes belonged to the State, and "which to individuals. The character of the two classes was essentially distinguished by this; that in the public affairs a complaint might be made by any "citizen; and in the private, it could be made only by the injured person, or his "nearest relation; for, in the one case, the State or the whole community was "regarded as the injured party; in the other, only the individual. But whoever "brought the suit, it was necessary in private and public concerns, for the complainant to enter his complaint before a magistrate, and definitely state the offence, which he charged against the accused. The magistrate, before whom the "suit was thus commenced, was now obliged to prepare the action, so that it "could be submitted to the judges. These judges were, either the whole community; or some particular courts, which may perhaps be best denominated, committees of the people. For, the tribunals consisted, for the most part, of very "numerous assemblies, the members of which were selected from the citizens by "lot, and were required to be thirty years old, of a good reputation, and in nothing indebted to the State. They were sworn to do their duty; they listened "to the orators, both the accusers and the defendants, to whom a limited time "was appointed; the witnesses were examined, and the affair so far brought "to a close, that the Court could pronounce its sentence of guilty or not "guilty. In the first case, the nature of the punishment remained to be settled. Where this was fixed by Law, sentence was immediately passed; did "the nature of the offence render that impossible, the defendant was permitted to estimate the punishment, of which he believed himself deserving; "and the court then decided.—As a difference was made between private "and public actions, we might expect to find different tribunals for the one "and the other. Yet this was not the case; suits of both kinds could be "entered in the same courts." (Bancroft.)

With a rude people, whose civil organization is inchoate, peremptory prohibitions, threatening warnings not to yield to the promptings of selfish, of angry, of inconsiderate impulse, must, obviously, form the main section and bulk of their laws.

A people in a highly advanced and artificial state of progress, require much more than this: commerce, contract, modifications of property—here is the field, the chief scope for Law and legislation with such a people. At the same time, inasmuch as the powers of human Reason may be a fulcrum to degrade as well as to exalt (for, the use, not possession of power determines its effect), civilization and progress, industrious plucking of the 'tree of knowledge of good and evil' lead to refinements in vice, to new phases of fraud. Whilst, therefore, penal laws usually cover nine-tenths of what may be termed the Law-arena, the Law administration of an early or an unprogressive race; the same class of laws need to be more complicated and various (a) although

(a) The progress of recent English and British Indian criminal legislation (converting breaches of confidence and civil frauds into highly penal offences) remarkably illustrates this historical truth. In attestation of the subjection of the merely political or conventional, to the moral element of Law and legislation, the barbarous cruelty of the English penal code, in its list of capital inflictions, has, under influence of christian philosophy and of an advanced state of the sciences, as well of government as of morals, been more than mitigated; notwithstanding the increase of crime and therefore increased necessity of State effort to repress crime. The learned John Allen, in his book on the English Royal Prerogative, remarks: "The changes that insensibly take place in the "notions and sentiments of mankind, when viewed at long intervals of time

smaller in proportion to the entire body of Law (framed for or grown up) with a race, a people, more advanced and civilised. Civilization implies increased opportunities for good, but by no means implies a guarantee for moral or utopian use of those opportunities, for a higher degree or kind of honesty or of moral rectitude, however this be defined or understood.

What said the people of Rome, in the reign of Augustus Cæsar, through their favorite poet?—

> "Are not laws vain,
> "If public thought and habit do not aid?" (a)

As illustrating the influence of purpose, intention, upon the jural character of acts, Mr. Broom instances: "—a man who takes a horse from the owner's stable, "without his consent, may intend to despoil him of it, "and fraudulently to appropriate it for his own benefit; in "this case, he is guilty of theft: he may intend to use "it for some temporary occasion of his own, and then to "return it to the owner; in this case, he commits a tres-"pass only. He may take the horse as a distress for rent "due from its owner, in which case he is justified by the "law. In each of these cases, the act done is substantially

"are not devoid of curiosity or unworthy of observation. The law of treason "was originally founded on the allegiance, fealty or mutual connexion between "a chief or lord and his men or companions, and when first introduced, it "gave no greater protection to the king than to the meanest chief in his "dominions!"

(a) "*Quid leges sine moribus*
"*Vanæ proficiunt?*" HOR.

"the same; the intention of the person doing it mainly "determines, whether it shall [in English law] be the "subject of civil or of criminal cognizance, or whether "it be altogether innocent."

Intent is the most material element in Crime; yet, a careless application of this rule may easily mislead. The distinction to be borne in mind is laid down by Lord Mansfield:—

"Where an act in itself indifferent, if done with a "particular intent becomes criminal, there the intent "must be proved and found; but where the act is in "itself unlawful, the proof of justification or excuse lies "on the defendant; and in failure thereof, the law implies "a criminal intent." Thus, the criminal mind is a question for the logic of judicature, of the science of proofs, legal presumptions; one of the simplest and most often quoted of these being that,—a man, in possession of his Reason, is always presumed to intend the natural, usual, probable consequence of his act.

Finally, it does not seem that we possess any definite standard whereby to classify, *a priori*, offences, as coming, because of their intrinsic juridical character, within the range of criminal law and legislation. Such offences may, however, be described, as,—that kind of delinquency, those breaches of Law, which the constitution, the necessities, the standard of conduct, peculiar to each State,

make it incumbent on the rulers of that State, in the opinion of those rulers, to treat as of general and public concern—faults, which the State, as the general father, protector, avenger, deals with not merely as redressing private injury, but, in vindication of public authority, of the very existence of the State. Such offences, whether private injuries or no, are pursued criminally, under the criminal law and procedure of the particular State. This is the normal and modern idea of Criminal or Penal jurisprudence.

In the venerable Hindu Code are eloquent general views and axioms:—

"Punishment is an active ruler; he is the true manager of public affairs; "he is the dispenser of laws; and wise men call him the sponsor of all the "four orders for the discharge of their several duties.

"Punishment governs all mankind, punishment alone preserves them; punish- "ment wakes, while their guards are asleep: the wise consider punishment as "the perfection of justice.

"When rightly and considerately inflicted, it makes all the people happy; "but, inflicted without full consideration, it wholly destroys them all.

"If the king were not, without indolence, to punish the guilty, the stronger "would roast the weaker, like fish, on a spit; (*or according to one reading*, "the stronger would oppress the weaker, like fish in their element);

"The crow would peck the consecrated offering of rice; the dog would lick "the clarified butter; ownership would remain with none; the lowest would over- "set the highest.

"The whole race of men is kept in order by punishment; for a guiltless "man is hard to be found: through fear of punishment, indeed, this universe "is enabled to enjoy its blessings;—

"All classes would become corrupt; all barriers would be destroyed, there "would be total confusion among men, if punishment either were not inflicted, "or were inflicted unduly.

"But where punishment, with a black hue and a red eye, advances to de- "stroy sin, there, if the judge discern well, the people are undisturbed.

"Holy sages consider as a fit dispenser of criminal justice, that king, who "invariably speaks truth, who duly considers all cases, who understands the sa- "cred books, who knows the distinctions of virtue, pleasure, and riches;—

"Criminal justice, the bright essence of majesty, and hard to be supported "by men with unimproved minds, eradicates a king, who swerves from his duty, "together with all his race:—

"Just punishment cannot be inflicted by an ignorant and covetous king, who "has no wise and virtuous assistant, whose understanding has not been improved, "and whose heart is addicted to sensuality:

"By a king, wholly pure, faithful to his promise, observant of the scriptures, "with good assistants and sound understanding, may punishment be justly inflic- "ted. MANU, ch. VII, sl. 17—31.

"Let the king, having considered and ascertained the frequency of a similar "offence, the place and time, the ability of the criminal, and the crime itself, "cause punishment to fall on those alone, who deserve it.

"Unjust punishment destroys reputation during life, and fame after death; it "even obstructs, in the next life, the path to heaven: unjust punishment, there- "fore, let the king by all means avoid.—

"First, let him punish by gentle admonition; afterwards, by harsh reproof; "thirdly, by deprivation of property; after that, by corporal pain;

"But, when even by corporal punishment he cannot restrain such offenders, "let him apply to them all the four modes, with rigour."

ch. VIII, sl. 126—130. (*a*)

(*a*) The Moslem deals with wrong-doing as productive of obligation to God and to the human sufferer. The *huq-ullah*, God's Right, in respect of a civil offence, is the State or public vengeance and punishment; the *huq-unnas*, private Right, is the satisfaction to the sufferer. "Whoever shall take a vengeance "equal to the injury which hath been done him; and shall afterwards be "unjustly treated; verily God will assist him; for God is merciful, and "ready to forgive." (*Koran*, c. 23)—a text which justifies generally, retaliation, beyond, as would seem, the specified range and rules of *kisas*. And, "—he whom his brother shall forgive [*scil.* foregoing *kisas*], may be prosecuted "and obliged to make satisfaction according to what is just, and a fine shall "be set on him with humanity." (c. 2.) "If a man or a woman steal, cut "off their hands, in retribution for that which they have committed: this is "an exemplary punishment appointed by God; and God is mighty and wise." (c. 5.)

"As noted by Lord Brougham, in his account of the Feudal system, "—the "law of the Angles, who gave name to England, provides, that whoever "succeeds to the land of any one, as his heir, shall likewise be entitled to the "warlike garment of the deceased, and to the revenge of his injuries against "his neighbours, and the obtaining satisfaction or redress for his followers. The

TENTH SECTION

JUDICATURE: ADJUDICATION, *JURISDICTIO*

Rules and methods for setting in motion and guiding those whose office it is to administer Law—to redress or to punish—are 'adjective' laws, in contrast with the

"Lombard law was originally the same; and there can be no doubt that such was "the general rule before composition by money-payment was introduced. Certain "limits only were affixed to the exercise of this truly barbarous right. Per-"sons of rank and station were alone entitled to exercise it."

In a learned treatise of 'the laws of the Barbarians' prefixed to Barrett's translation of the *Code Napoléon*, (written by the late Mr. Geo. Spence, of the English Bar, and republished by him in a work quoted *supra* p. 100, no. (*a*)) we read:—"In the codes of the Barbarians, a person who had offered a per-"sonal injury was denominated a *faidosus;* the enmity of the relations, where "they were entitled to call for revenge, or individual injured was termed *faida;* "it was the main principle of Barbarian jurisprudence, that this animosity "was to be appeased by gifts, independently of what was given to make up "the damage occasioned by the unlawful act—the laws of the Saxons "and Frisons permitted the person injured to kill a *faidosus*, if he persisted "in refusing to give the requisite satisfaction, in any place excepting in his "own house, or in a sanctuary, or in going to, or returning from, the county "court; but a man bred up to arms would not tamely submit to his punish-"ment, the accuser therefore must conquer before he could avenge, and combat "was in such cases at length prescribed by law—from the earliest times, "we find that the offender, besides the 'composition' due to the injured "party, was compelled to satisfy by gifts the resentment of the chief "of his tribe, and hence originated the *fredum* mentioned in the codes. "The *fredum* then was a fine paid by the offender to the State, in "recompense of the animosity of the chief of his community excited against "him by his having, contrary to right, committed certain acts leading to con-"sequences prejudicial to the society at large. All the codes inflict penalties "on those who thus offend, but not universally by the name of *fredum*. In "the code of the Lombards, the unlawful act for which fines are due to the "king, and the amount of such fines, are particularly specified in the law "which declares the act unlawful. By the other codes, if a man was con-"victed of theft or violence, or of knowingly buying stolen goods, or of "refusing to pay a debt legally contracted and proved, or of taking a pledge "from another contrary to law, a *fredum* was due to the Fisc. In some na-

'substantive' laws which prescribe Rights and conduct. They are also known as, Procedure, the method in and by which Law acts or proceeds, in order to enforce legal remedies and sanctions.

Remedy has been classed as a civil Right; it is a healing, a solace, a restoring, through the magistrate, the State-functionary, of one wronged. To pronounce when Right has been infringed, who is a wrong-doer, what remedial obligation has been incurred, what shall be the measure of reparation, or, of State-vengeance—such is the greatest, the most beneficent, and yet the most terrible function of sovereignty; for exercise of which there is unceasing demand. *Jus*, Right, Law, can be known, felt or appreciated by a primitive people, by the masses among any people, only through the action of that function. The law-declarer, the right-vindicator, the denouncer of wrong, the arbiter of doubts—wisdom, power, mercy, truth—such are, by universal assent, the

"tions the amount of the *fredum* to be levied on each offence was particu- "larly specified by the laws; but among the Francs, the sum thus levied was "always a certain part of the composition, or sum directed by the law to be "paid on the commission of certain offences; the whole of which composi- "tion was received by the party aggrieved, and he delivered over the *fredum*, "or portion due to the Fisc, to the *grève* or judges of the Court where the "offender was convicted; and they, as also the Court, were most probably "entitled to reserve some portion of it for themselves. When an unlawful act "was committed unintentionally, or by accident, the *fredum* was not levied. "The *weregild*, properly speaking, consisted of so much of the legal compo- "sition affixed to the life of a man as remained after deducting the *faida*, "where the *faida* was still distinguished from the compensation, or the "*fredum* where the *faida* and compensation were consolidated."

office, and attributes, at once of the human judge and of Divinity. In theory, every tribunal of justice must, each in its own sphere, be perfect, in thought as in act: if fairly chargeable with, or suspected of imperfection, of frailty, in its official working, by so much is any tribunal (and so universally and instinctively held to be) a sham and a pretence, the instrument of capricious human will, not a dispenser, a representative of 'justice.'

The Moral Sense, the rough daily experiences of the rudest people lead them to human succour, to human remedial power, with hope, (with confidence or trembling as may be,) to ask for 'justice.' The tribunal which deals out that justice is, itself, the embodiment of Law and Right, the human oracle, the expounder of Heaven's decree.

The collective prowess, the fighting strength of the community, is looked to as a shield from external aggression; but, the function of the Decider of disputes, of the Purveyor of justice, comprises all that is most valued or valuable in the domestic relation of a State to its people. Through that function the action of government is felt, and is vitally current in the minds and hearts of the people.

Whilst other, executive or administrative, functions of sovereign power are submitted to as inevitable but human arrangements; this, the justice-giving, the scales-holding, the oracular, the purely beneficent, announces itself and

assumes to be, the representative, the shadow, the instrument of an unseen, a divine Power—of Right and of Truth.

Homer's hero describes by this one characteristic the emblem of regal sway :—

"Now by this sacred sceptre hear me swear,
* * * * *
* * * * *
"An ensign of the delegates of Jove,
"From whom the power of laws and justice springs
"(Tremendous oath! inviolate to kings)" (*a*)

A learned English writer, after having shewn that, among the Northern and Central European nations, judicial power and organization preceded monarchy, narrates the growth of monarchical justice in England :—

"Soon after the Anglo-Saxons were established in Eng-"land, they substituted permanent kings for the tem-"porary leaders that had formerly conducted their armies. "The kings thus appointed appear at a very early period "to have had a court or council, in which they presided, "for administering justice and ratifying civil transactions "between their subjects. Penalties were assigned to them "as protectors of the peace and guardians of the laws. "The tribunal of the king was the supreme court of

(*a*) *εν παλαμης φορεουσι δικασπολοι, οἵτε θεμιστας προς Διος ειρυαται·*
And Sophocles, in his *Œdipus Coloneus*,
δικη ξυνεδρος Ζηνος αρχαιοις νομοις

"judicature, but no one could apply to it for redress till "he had been refused justice at home in the hundred "and shire to which he belonged. The chiefs, who con-"tinued to preside in the inferior tribunals, were styled "the king's *ealdormen, gerefan,* and *thegns,* and in the "contemplation of law, they were held to derive their "jurisdiction from him. They, still, however, retained "some vestiges of their ancient independence. They re-"quired no writ from the king for their proceeding. "When any affair within the competence of their court "was brought before them, they cited the parties to "appear, and took cognizance of the case, as they would "have done before royalty was established.

"When an application was made to the king for re-"dress, he either presided in his own court at the trial, "or sent his signet to some other tribunal, with direc-"tions to hear and decide the cause. It was not till long "after the conquest that the kings of England ceased, "occasionally at least, to attend and take part in the "proceedings of their courts of law. In the time of "Henry II. the king used to assist in the administration "of justice both in the *curia regis* and in the Exche-"quer. Henry III. is mentioned as having repeatedly "sat in Westminster Hall with his judges——" *(a)*

Mr. Spence, in his *Inquiry* before quoted, thus de-

(a) ALLEN, *Inquiry into the rise and growth of the Royal Prerogative in England.*

scribes the proper regal court of the middle ages, in Europe :—

"Amongst the Francs, a court was held before the "king, and the dukes, bishops, counts, and *antrustions* "who attended the royal person. This court, which was "always open, was denominated *curia regis*, or *forum* "*regis*; but amongst the Francs, the king did not, at "least latterly, preside there in person. The count of "the palace was first appointed to preside, but was "afterwards supplanted by the mayor of the palace. A "similar court was held by the Anglo-Saxon sovereigns. "This was the supreme court, and general court of "appeal for the nation. At this court also all questions "not provided for by the laws were decided; and a man "who had commenced a suit in the county court against "a person in authority, and was dissatisfied with its "progress, might remove it by relation to the king's court. "Here the nobles were arraigned for high crimes and "misdemeanours; and though the nobles had the option "to proceed before the county tribunals, it was in this "court that controversies in which they were concerned "were usually decided. The *antrustion* who, after a legal "summons, refused to appear in the county court to "answer a freeman not noble, might be sued by the com-"plainant before this tribunal. Sales and transactions of "considerable importance between freemen of all classes "were, for greater solemnity, concluded in this court;

"and slaves were manumitted there. When deeds or "evidences of title to land were lost or destroyed, general "confirmations of title were, at the petition of the owner, "issued from this court, in the name of the king, and "the king, on being petitioned to that effect by the "parties, sometimes sent one of the members of this "court to superintend partitions between the co-owners "of undivided lands.

"Advocates were assigned by the king to represent "and protect the interests of those persons who, on the "ground of ignorance or incapacity, declared themselves "unable to conduct their causes, whether in the king's "court or county tribunals."

Seignoral Right, in a subject, a royal vassal, implied judicial administration over the tenants and vassals of the seignory: this was a delegation from the sovereign and supreme source of judicial power, necessarily accompanying the position of a *hlaford.* (a)

(a) The original designation, among the Anglo-Saxons, of a lord who held of the Crown.

"It is observable, of all the conquests made by all the feudal nations, that "to the possession of lands there was always attached a power of judging the "people that lived on them." DALRYMPLE

"In the time of Charles the Bald, and even of Charlemagne, the judicial "authority of the Francic beneficiaries, or vassals as they were called from "the time of Charles Martel, had become general if not universal throughout "the new empire of the West; the same was the case in Britain in the time "of Edward the Confessor; but Theodoric the Great would not allow any such "privileges to the grantees of the fiscal domains—" SPENCE

There is, however, in the primitive, the universal, the popular conception of 'judgment', a something which the humblest mind may claim to understand, to appreciate, to be able to fathom, to criticise and to measure. That something has to be detached from what is acknowledged to need superior wisdom, learning—from the mysterious, the dogmatical, the doctrinal: that something is universally felt to be an indispensable attribute, an every-day necessity of every father of a family, of every sane man, *scil.* to know right from wrong, truth from falsehood, broadly, practically, feelingly. The man feels and knows when himself is unjustly used, and he may therefore confidently undertake to pronounce which of two disputants, who are like unto himself, is in the right. He well knows he cannot enforce justice beyond his own family or personal circle; he well knows (speaking generally,) he is not qualified to apply Law, the State's Rules; even self-regard must usually induce the most radical democrat to shrink from this, which he understands not, and therefore, instinctively, declines to take part, or looks for guidance in.

Not that the confidence, the power of judging, is patent, self-suggested to the rudest or earliest races, who thankfully accept decision of their doubts, their claims, as a boon from Heaven: the assertion or consciousness of the sentiment is an assertion of manhood, of the consciousness of a free mental and moral existence. As soon as this occurs or dawns, the disposition to rest so completely on

another's will, though that other be a king, a ruler, or a sage, wavers as respects decision of what the subject's moral sense and daily experiences give him complete assurance of, whether rightly or wrongly.

Such is the broad view and fact of the matter; and which authorises *a priori*, as it accounts for, what we find in History, *viz.* wherever a political scheme admits of one or more or all classes of the people, the masses, taking part in, even being wholly trusted with the judicial office (although the latter is clearly an abuse, an over-stepping of the grounds, the excuse for popular judicature), the sentiment above alluded to and characterised has urged the people forward.

Yet, does not the yearning for, or assumption of a large or any portion of judicial power by those under political subjection, at all detract from the mysterious awe and significance of the justice-distributing function. But, what says Bacon?—

"The common justice [*scil.* prevailing sense of justice] "of a nation, like a philosopher at Court, renders Rulers "aweful." (a) *i. e.* full of dread and caution, lest they err.

History and records of travel abound with illustrations of what is above premised on the prominent, *quasi*-divine, absorbing character and importance of the judicial or adjudicating function of civil Government: nor do they

(a) *De Augmentis Scientiarum.*

less illustrate the growth and action of the inherent aptitude and appetite for 'judgment' in every adult (erect, undwarfed) mind, however little instructed.

With those reflections, a student of the principles of jurisprudence may well dismiss (as respects that study only,) care or regard for plans of judicature and of procedure in past times, in various countries. To the statesman, to the politician, to the legislator, we leave the constitution of tribunals, (a) the division of judicial labour, the forma-

(a) It is certainly of the first importance, in a political and administrative point of view, that the *personnel* and machinery of a people's judicature should be correspondent with their genius, their disposition, their opportunities of qualifying for the task of judgment. The historical changes of style in the formulary of judicature exhibit an anomalous variety, because immediately dependent purely upon political accidents. "In the *schyremote*, the duty of the bishop and of the earl or "his deputy, and in the hundred *mote*, and *burg mote*, the duty of the *ealdorman*, "*gerefa* or other president, was only to explain the law, and to see that the judg-"ment of the Court was carried into execution. Whatever was the mode resorted "to for determining the question in dispute, whether testimony of witnesses, the "oaths of compurgators or co-jurors, or the judgment of God, the domesmen, the "thanes or judges of the Court, in the same manner as the *scabini* of the "Francs and *judices* of the Romans, not only found the truth of the facts "which they had to try, but also, under the directions of the *eorl* or bishop or "the *gerefa* pronounced the judgment, which, according to law, was conse-"quential on such finding.——As every considerable land-owner was thus "liable to be continually called upon to act in the character of a judge, there "are in the Anglo-Saxon laws numerous regulations for their conduct when "engaged in the exercise of this very important duty.——About the time "of Edgar, a practice appears to have obtained of causing a certain number of "the thanes to be appointed to decide upon each question that was brought "before the Court.——In the reign of Edgar, Edward the elder, and Ethelred "his son, we still find judgment given in civil suits by the whole body of "thanes assembled at the *mote*. On the Welch borders——it was directed in "the time of Ethelred the second, that twelve persons skilled in the law should "be appointed to decide each cause that should arise between a Welchman "and Englishman, of whom six should be English and six Welch." SPENCE.

lities in reaching the goal, in threading the avenues of justice. Our task is, to examine, to analyse, to distinguish, the elements, the characteristics, and the accidents of the law-administering function of sovereignty—a head or branch of jurisprudence more simple and independent

"*Non tamen obscurum est, pro ratione causæ, nunc 'dominum feudi,'* "*nunc 'curiæ pares,' nunc 'loci ordinarium,' nonnunquam 'arbitrum,' feuda-* "*les lites componere posse.——quando contentio inter vasallos est de feudo* "*regali, hoc est, 'ducatu,' 'marchionatu' vel 'comitatu,' supremus princeps* "*a quo ipsi se investatos dicunt, judex competens est.——cum controversia* "*est de feudo non regali, rursus distinguendum, aut ea est inter 'valvasores'* "*i. e. minores et inferiores vasallos, aut inter 'dominum' et 'vasallos,'* "*aut inter 'dominum' et 'extraneum,' aut denique inter 'vasallum' et* "*'extraneum.' Si inter valvasores, dominus feudi (sive is sit ignobilis,* "*sive nobilis, sive mas sive fœmina—) judex competens est.————*

"*Sed hæc, quæ diximus, cessant, si, vel consuetudine regionis, vel pacto in-* "*vestituræ, aliud sit receptum, puta ut vel ordinarius loci judex, vel alius certus* "*magistratus ad id constitutus, de causis feudalibus, excluso domino, cognoscere* "*debeat. Si, an uterque litigantium sit vasallus, non constet, aut uterque con-* "*tendat, feudum sibi noviter esse datum, &c., non domini sed ordinarii erit* "*jurisdictio: si uterque contendat, feudum esse antiquum, dominus cum* "*'paribus' competens judex erit: si unus dicat feudum novum esse, alter* "*antiquum, cognitio——ad 'pares curiæ' pertinebit.——Si lis sit, non inter* "*vasallos, sed inter vasallum et feudi dominum, controversia non apud* "*dominum, cum ipse sibi jus dicere nequeat, sed apud pares ejusdem curiæ* "*est terminanda.——Quod si quæstio de re non feudali incidat, ad ordinariam* "*ordinarii judicis jurisdictionem vel arbitrium res devolvitur.—— ——*

"*Si Sententia, super feudali causâ lata, sit iniqua, ab ea 'appellatio'* "*est concessa, eademque servanda ratio, quæ jure communi. Nempe ut ea fiat* "*gradatim. Ne turbato ordine jurisdictiones confundantur. Itaque si dominus* "*feudi pronuntiavit, ad proxime Superiorem illius feudi, et tandem ad Impera-* "*torem, vel alium Supremum loci Principem, est appellandum.*"

CORVINUS, *Jus Feudale.*

The sovereign democracy of Athens chose 6000 from their ten tribes, as Heliasts, so named from their place of assembly. The numbers who met at one time for business varied from 200 to 1500. They were divided into committees: who should take a particular case was decided by lot; the conduct of the case (ἡγεμονια τοῦ δικαστηριου) by public and qualified officers was provided for. A preliminary proceeding was necessary before a magistrate, where

of precedent, in its own nature, than the portion which deals with rules of Law. For, these are the coursers which draw the car of justice; the former, only harness: the quality and size of the coursers may have to be adapted to the ground and to the obstacles of the way; the harness need but fit the steed, and in substantial requirements can not much vary, although in taste and ornament it may.

The head of jurisprudence which treats of judicial application of laws, *scil.*, the judicial office, judgment, has two phases, aspects or departments;

sometimes it was concluded, otherwise it was submitted by him to the popular judges. The judges gave their votes as soon as the pleadings of the advocates closed. If the defendant or accused was cast, then sentence, public or private, *e. g.* fine or surrender of disputed property, was pronounced; and when there was discretion as to the nature or measure of the sentence, arguments were heard upon this. Further, Professor Hermann tells us,—"for the sake "of expediting public proceedings, and lessening the onerous duties of the "magistrate, 44 citizens were annually chosen by lot from each *phylee* to act "as public διαιτηταί, and the magistrates again decided by lot, before which "of these committees [arbitrators] they should respectively send the private "suits that came before them. Besides the *Heliœa* and *Diœtetœ*, we find "Courts, or rather juries, chosen from persons of the same profession or "craft; thus, breaches of military laws came before Courts-martial, profan-"ations of mysteries were examined only by initiated persons; the *nautodicae*, "although chosen by lot, seem to have been of the same description, charged "with settling disputes concerning commerce and navigation."

The several judicial institutions above described exhibit matured popular privileges, and vastly differing from the tribunals of even republican Rome (at first an aristocratic polity, by the way). The *leges Valeriœ* which gave to *comitia centuriata* exclusive jurisdiction over the life, liberty and honor of a citizen were exceptional. Patrician magistrates, a highly artificial and cumbrous procedure, patrician judges of fact, sitting singly, disposed of all Roman civil interests, in those days, and until a much later period.

1. ascertainment of disputed facts;

2. *juris dictio*, declaration of the law, *i. e.* the law to be applied to facts admitted or proved.

The difficulties and struggles, as the triumphs of Judicature, are less in arriving at conclusions upon moot questions of Law, than in unravelling mazes of disputed fact. An early people, a people with whom the science and the art of abstract investigation are either distasteful or in infancy, resign in despair or unscrupulously escape from this duty of a governing power. Witness trials by ordeal, by wager of battle, by compurgators—all, wretched (even cowardly) subterfuges for the great and difficult task of judicial scrutiny!

Unless and until called into exercise, (as it were summoned) by facts, acts or events, Law is inactive; a mere precaution and warning. Judicially asserted and judicially proved facts, involving either a violated right or a legal offence, result from efficient action, motion, effort of the sovereign judicial function. (a) Facts being decided and settled, Law is applied, *i. e.* the outside rule, predetermined

(a) *viz.* the parties, or their forensic representatives being present *(vocati in jus)*, there are,

1. counter-statements;

2. *lis contestata*, issues;

3. evidence;—in other words, the several stages of Procedure, which, in one form or other, more or less completely, must be gone through, expressly or impliedly, intrinsically though may-be not ostensibly, on, previous to every application or exhibition of substantive Law.

to suit and apply to those very facts, whenever and wherever found.

Then is pronounced the violation, together with the mandate for redress—the guilt, and then the sentence, the sanction. The civil mandate, if disobeyed, is followed by its sanction, *scil.* seizure of person or property.

Frequently, the *juris-dictio* is separated from the enquiry into fact, which has to precede it; *e. g.* the reference to the Róman *judex,* the verdict of the English jury: and, whether the two duties are or not assigned to the same functionary (in itself an accident, not a principle), the two operations are of-course essentially and logically distinct; their results, however, combining, in each case, to work out the problem, to determine the form of judgment to be pronounced. The facts have to be elaborated, to be sought, extraneously; the law applicable, has but to be declared and expounded, as it exists and is (potentially and in theory, if not in fact) known *a priori.*

In the judicature or adjudication of Fact, the first step obviously is, to know what fact or facts are sought, have to be ascertained. It is the office of the judge, of the Court-president or of the procedure (a) to ascertain this.

(a) *scil.* in and by a scheme of 'special pleading.'

The disputed matter of fact, the respective affirmations and negations, being made clear—*scil.* an unknown quantity, or quality, proposed—the machinery of judicature is applied to discover, to prove the unknown from the known, to attain a truthful result, to ascertain, morally not mathematically, whether the affirmative or the negative of a given proposition be true, to arrive at a human, reasonable, wise and just conclusion.

Now, to do this, is, substantially, but the repeating, transferring, with added solemnity and formality, a process daily (nay, hourly) gone through by all men in the business and intercourse of life, even in the most contracted circles. For, assuming (a usual, although obviously incorrect assumption) that the senses, as a rule, convey only truth to the brain—how many more facts we need to enable us to fulfil the most ordinary duties and necessities of any position, than our own senses assure us of! Belief in testimony; inferences, rational deductions from collateral facts, from probabilities of conduct; these sources, these traces, vehicles, landmarks of, roads and guides to knowledge are ever present: we have but to study how to use them rightly, a science of meditation and experience, certainly not of intuition. It is obvious, however, that the link of *certainty* must be wanting. What a man sees, in ordinary parlance he knows; but he cannot *know* what another man tells him that he (the latter) saw: nor are the inferences and deductions constantly

admissible in judicial proof, such as produce mathematical certainty. Some degree of risk must be run. How great that risk, where accident (as ordinarily in common life—and, as has often been even in forensic contest), not method, governs the enquiry! It is in the conscientious study, improvement, application of the science and tests of Proof, the perfecting and administration of the Law of Evidence, that, modern judicature (especially in the English system) holds proud pre-eminence. We find occasionally an intent to systemise proofs in ancient days [(a)]; but anything worthy to be called a science of judicial evidence is the product of modern, it may even be said, of recent civilization. The old

(a) *e. g.* "If a man be slain, and it be not known who did the deed, his "sons, kindred, wives, also women who are in the habits of illicit intercourse, "are to be separately and without delay questioned,—as to whether any quarrel "has occurred, whether the deceased was addicted to women, or fond of what "is costly, or seeking gain, also with whom he had gone—or, the people in the "neighbourhood of the place where the murder occurred shall be examined, by "gentle means." and "Legal proofs are described as, writing, possession, and "witnesses. In the absence of either of those, it is ordained, that some one of "the ordeals is to be resorted to." and "Although proof has been given by witnesses, "yet if others of more distinguished qualities or in number twice as many give "opposite testimony, the first witnesses should be held as false ones." and "The authenticity of a written instrument which is doubtful, is to be ascertained "by comparison with other documents in the handwriting of the party, by "enquiry into the probability of its having been obtained, and the mode of its "preparation, by observation of any marks, by enquiry of the relation in which "the parties stand to each other, and how the matter came about," and "When "there is a dispute as to boundaries, the neighbours of the disputed land, old "men and the like, cowherds, cultivators of the soil close to the disputed "boundary, and all whose business is in forests—these shall determine the "boundaries, as they are indicated by elevated ground, by charcoal-remnants,

world, when any effort of thought was at all made, were content with impressions, conjecture, strong supposition. (a)

This matter is well put by a writer on the Philosophy of Evidence:—"Lord Monboddo has very correctly said,

"by husks, by trees, by a causeway, by ant-hills, by depressions of the soil, by "bones, by memorials, and such-like." YAJNAVALKYA (Roër and Montriou)

A curious instance of Hindu pleading and formal arrangement of proofs is given, from the *Mitakshara*, by the translators of Yajnavalkya, in a note to sl. 17.

(See the chapter in Corvinus, *de probationibus in causis feudalibus.*)

The superiority of modern probatory procedure scarcely consists in any discovery of new or artificial modes of proof; it is rather in discretionary and scientific use of modes (ancient because inevitable,) already familiar. In one of the *Noctes* of Aulus Gellius, the accurate and gossiping scholar tells a tale of his own experience as a *judex*, that a certain defendant insisted—"*clamitabat "probari apud me debere pecuniam datam, consuetis modis, expensi latione, "mensæ rationibus, chirographi exhibitione, tabularum obsignatione, testium "intercessione*—" which list includes probably all tests, or tokens, or likelihood of proving indebtedness furnished by popular usage and habit, at the time. The same narrative is a record of the unsettled state or absence of any science of evidence, inasmuch as the question argued was, whether a plaintiff's defective proof of 'debt' could be supplemented by what is well called *argumenta exilia*, being simply the plaintiff's general good character, and the so-called debtor's bad one. Certain learned assessors *(quos rogaveram in consilium)* were clearly of opinion that a claim supported *nullâ probatione solemni* be dismissed. The *judex* however sought counsel of a great authority, one Favorinus, who quoted and adopted a sentiment of M. Cato,—"*a majoribus memoria "sic accepi: si quis quid alter ab altero peterent, si ambo pares essent, sive "boni sive mali essent, quod duo res gessissent uti testes non interessent, illi "unde petitur ei potius credendum esse*—" This was certainly an acquiescence, in result; but, the puzzled *judex* appears to have evaded the task; he says, "*judicatu illo solutus sum.*" (XIV, c. 2)

(a) In this branch, as in others, the jurisprudence of the disciples of Mahommed evinces care, and some discrimination, although mixed with arbitrary and irrational distinctions. Strong presumption or suspicion, is a distinct jural conclusion with them: such a *futwa* was interpreted by the Courts of the East India Company as a conviction.

"that every man is the architect of his own ideas, and "forms a little intellectual world of his own. In truth, "according to the differences of our tempers, habits, and "natural propensities, we observe, compare, or draw con- "clusions, more or less hasty and fallacious, which might "be corrected by a deliberate examination of things, al- "though we act too often upon these preconceived notions "or prejudices, without dealing justly with our own "minds, hence, therefore, a necessity arises of establishing "certain rules to restrain the latitude of individual "opinion, to direct our views and conduct the investiga- "tions of truth by a strict and methodical course of "argument. The law of evidence is framed with this "intention, however incompetently it may perform the "office of perfect admonition, and the rules we shall "find established for the legal examination of facts, "are calculated either to indicate the mode of enquiry, "or to regulate our judgment in the estimate of "proofs." (a)

(a) M'KINNON (1812). Since then, the science of proofs has made considerable advance; needless cautions and obstructions being abrogated, and vague dogmas giving place to safeguards prompted not by indefinite fears but by reason. The very circumstance that discovery, ascertainment of hidden facts, is a familiar practical necessity of social life, constant and universal, makes, to men in general, the reduction, the discipline of proofs into a science, difficult, rare and distasteful—the task has to be forced; seeming, upon impression, superfluous, savouring of the pedantic, a building up of difficulties. But little earnest study or attention, however, can be given to forensic experiences, by a candid and enlightened mind, without a consciousness, that 'judgment' is a science, not more in the mastery of rules of substantive law and of their

In this branch of judicature, *viz.* the weighing of testimony, of probabilities, appeals to experience, to the reason of things, is the field of impassioned advocacy, of forensic oratory, for the powers of a Cicero, an Erskine, a Berryer.

With respect to official and authoritative expositions of *jus*, the Law of the Land, in exercise of the judicial

application, than in the handling of testimony, in the admission and in the perfecting, as well as in the nice balancing of proofs. The multiform problems of 'probability' cannot be always, can very seldom be, with safety, worked out or dealt with upon intuition. Bentham's ideal—'a kind father in the midst of his family, regulating their differences &c.' is true not merely as a prototype of judicial procedure, but of all government; yet is it but a prototype: nor can any assembly of untrained *patres-familias*, whatever their individual worth and success in family administration, be a safe substitute for disciplined judges and professional presidents of tribunals. As well might it be said, the art of war (to which many sciences are auxiliary) is superfluous, because self-defence is an instinct, and physical resistance a faculty daily brought into exercise as inevitable private contentions occur.

To construct into a science, is but formalizing, improving, enlarging, adapting, analytically testing, what was familiar, and yet, of necessity, but imperfectly and incompletely known.

Mr. Stephen, in *Cambridge Essays* of 1857, ably reviews the characteristics and changes of English Criminal Law and Procedure, especially in comparison with that of France; showing how the latter well exemplifies the 'inquisitorial' method of dealing with crime and the suspected, whilst the English has grown into a purely 'litigious' scheme. He sums up:—"In short, an "English criminal trial may be considered as the discussion of the question: "shall we grant the prosecutor's demand that the prisoner may be punished? "—The whole effect of our criminal procedure is, to regulate the manner in "which this request is to be put forward, and the terms on which it will "be granted." And then are contrasted, with modern criminal judicature, the State trials of Col. Turner for burglary in 1669 and of Count Koningsmark in 1682, when, "the principal witness for the Crown was the committing "magistrate, who not only closely questioned the prisoners upon the circum- "stances which inculpated them, but personally made investigations closely

office; these form, collectively, a large and valuable portion of the civil laws of every State. They are either;

1. simply, enunciations and familiar application of plain and known rules of Law;

2. constructions of ambiguous enactments, *leges*, statutes, or, in a hitherto unaccustomed sense, of rules familiar and defined; or,

3. adaptation, new application, may-be modification, supplementing, of known laws, to suit some new phase of circumstances, new modes, new habits, new fields of action and intercourse.

"resembling those of a French juge d' instruction. They also stated in Court "a great variety of circumstances which in the present day would not be "admissible in evidence, in order to account for their suspicions having been "aroused. In both cases, also, the prisoners were interrogated." [This is permitted by the new Indian Criminal Procedure, but in a guarded and modified way.]

Here are extracts from a Scottish judge's charge (and Scotch procedure is less rigid than the English in admission of proofs,) on a trial for murder, of great complexity, a *cause celèbre*:—

"No matter how surrounded the prisoner is with grave suspicions, and with "many circumstances that seem to militate against the notion of innocence "upon any theory that has been propounded, still, are you prepared to say "that you find, &c."

"But still, these are but suppositions—these are but suspicions. Now, the "great and invaluable use of a jury after they direct their attention seriously "to the case, as you have done, is to separate firmly—firmly and clearly "in their own minds—suspicions from evidence. I don't say that inferences "may not competently be drawn; but I have already warned you about "inferences in the ordinary matters of civil life, and in such a case as this."

(*Trial of Madeline Smith,* 1857)

And are not such warnings, from a mind trained in judicial science, needed, in such a strait (where every thing points to the *possibility* of guilt), by those who have, but happily under guidance, to decide on circumstances, on probabilities?

In each of the second and third instances, a new rule, a new law is, practically, introduced by the judge of last resort, *i. e.* the final judicial authority. Other minds might have made, might have construed, have enunciated the rule differently. Rules of Law so constructed, are distinguished by the name, judge-made Law; they are also, and with reason, called, the scientific branch of a nation's Law.

An English judge (Lord Abinger) has described and characterised this responsible province of the judicial function :

"In a case perfectly new, to which the Law furnishes "no analogy, where the judges are called on first to "establish a rule; we must, according to our own im-"perfect light of public convenience, advert to it: for such "is the nature of the Law of England, and indeed of "the Law of all countries, that cases not provided for by "the contemplation of the legislature must, as they arise, "be determined by the good sense of the judges, in ana-"logy as far as they can to the former cases; and if that "analogy be not perfect, if it cannot be traced satisfactorily "to the understanding, so as to find some principle estab-"lished by decided cases or rules which may meet the "immediate case, then you are at liberty to consider, "which is the safest course to adopt for the public "convenience; and you must exercise your own limited

"judgment as to what may be most for the public "convenience."

But, the warning adopted by the great English technical jurist and case-reporter, Sir Edward Coke, has to be borne in mind:—"judgment should be by laws, "not by instances." (a) No judge-made rule has the intrinsic force of an act of legislation: unlike the latter, its merit, its title to respect may, and rightly, constitutionally, be canvassed by other judges who may be called on to recognise and to act upon it. Thus, it may be 'over-ruled.' This power of review and correction, this treating of a judge-made law as an open questionable proposition, is limited by wise judicial discretion, but only thus.

Considering the difficulties often attending construction of written Law—more often than in recognition and application of those unwritten rules which have grown up or been transformed (in most instances insensibly and gradually) from habits and manners into Law—a review of the principles of jurisprudence would be incomplete without some comparison, in this respect, between the two classes of functionaries upon whom the task devolves, and who share the power as well as responsibility of the double task. And it is to be premised, that in the phrase 'written law,' may be included (for the present consideration),

(a) *Judicandum est legibus, non exemplis.*

not merely every enacted law or act of a legislature, but also, every recorded, recognised, defined rule, observed and current as a law.

Thus are we led to consider,

Judicial and Legislative Construction: Growth of Law.

Historically and rationally, the judicial precedes, in exercise, the legislative function of sovereignty. The first efforts of government are not deliberative: they are active and decisive. Rules of organization are then simple: the State interposes to decide quarrels, to compose disputes, not to create Rights. In time, observance and habit and usage take an authoritative form. Thus, with truth may it be said of civil law, as of language,—it is not made, but grows; the natural growth, however, needs pruning, training—needs, in fine, care and culture: this care and culture is confided to, is the inevitable task of judges and of legislators, in their several departments.

But, there is a broad line of demarcation between an unused interpretation, a new meaning to a law put by the proper law-making power or branch of a State, *scil.* its legislature, and by its judges.

The existence of a power, to make or define Law, in the latter, although a necessity, is (now-a-days, and always among an advanced people, one having a well-defined polity) an accident, a token of the inevitable imperfection of human language, of human fore-thought;

and to be used, to be tolerated only so far as the necessity warrants.

"It is forbidden to the judges to give judgment by "way of general, regulating ordinance, upon the ques- "tions submitted to them"—declares the *Code Civil* of France. Upon the original introduction of this provision to Nápoleon's council of state, the minister of justice explained,—"There are two sorts of interpretation, the "legislative and the doctrinal; the latter is essentially the "province of the tribunals, but the first is forbidden to "them—" (a)

Bacon (on taking his seat as Chancellor) declared—

"As that law is ever the best, which leaves least "to the breast of the judge; so is that judge the best, "who leaves least to himself." Again, he wrote—

"It is not expounding but divining, to recede from "the letter of the Law. To leave the letter of the Law "makes a judge a legislator." And again, referring to extraordinary jurisdictions that give a discretion beyond the letter of Law (*e. g.* the prætor's and the chancellor's) :— "These jurisdictions should reside only in supreme courts, "and not be communicated to the lower; for the power "of supplying, extending, or moderating the laws, differs "but little from a power of making them."

(a) Dupin, *Notions sur le. Droit.*

Construction, interpretation of the ambiguities of statutes, as well as of probatory instruments, should, obviously, be according to a systematic and scientific method, regarding grammar, context, subject, intention.

Particular explanation of that method does not range with general principles of jurisprudence, although a head of juridical science.

The following short analysis is extracted from Professor Thibaut's *Pandekten Rechts:*—

"By the interpretation of a law, is meant an accurate "statement of the precept contained in it (the meaning of "the law)—

"A law may be interpreted either by the law-giving "power (*interpretatio legalis*), or otherwise (*int. doctrin-"alis*). Legal interpretation is again either 'authentic' (*int. "authentica*), or 'customary' (*usualis*), according as it pro-"ceeds from the sources of written or unwritten Law "respectively.—

"It is necessary clearly to distinguish from each "other; 1. That which is actually signified by the words "as they stand (the meaning of the words); 2. That which "was meant to be expressed (the intention of the legisla-"tor); and, 3. The result arrived at by a logical deduction "from the reason of the law.—

"An interpretation if based upon the meaning of the "words of a law, is termed 'grammatical.' If based, as it "ought to be, upon the spirit of the law (*sententia legis*),

"*i. e.* upon the intention of the legislator and the reason "of the law, the interpretation is termed 'logical.'

"The person on whom the duty of interpretation "falls, must, in the first place, look to the words used, "and must only resort to a logical interpretation when "there is a clear necessity for so doing. If he cannot "ascertain either the meaning of the words or the spirit "of the law, he must search for an authentic interpreta-"tion. If however, a doctrinal interpretation is possible, "he must abide by it; even though the result at which "he may so arrive be opposed to that which notions of "natural justice and morality, or of what is ambiguously "called 'equity' (*æquitas*) may seem to require.—

"An interpretation strictly grammatical, and arrived "at by confining oneself to the exact meaning of the words "of an ambiguous law, is called 'literal' (*int. verbalis*). "An interpretation of an ambiguous law is said to be "'liberal' (*int. lata*) if based upon the wider meaning of "the words used, and 'strict' (*int. stricta*) if upon the "narrower. By a strict interpretation is, however, often "meant a literal interpretation of a law, whether ambi-"guous or unambiguous, as opposed to any logical ex-"tension of its literal meaning.

"——If the meaning of a word has changed in dif-"ferent times, that meaning is to be preferred which was "common when the law, in which the word is found, was "promulgated. Laws which are really ambiguous can only

"be interpreted grammatically, by a correct statement of "every meaning they may possibly have: which of these "is to be deemed the true meaning, must be discovered "by logical interpretation." (Lindley)

With respect to that 'growth of Law' which lies deeper than what may come under the head of Construction, the principles and foundation of the matter are thus commented on by the profound German jurist Savigny:—

"The basis of every body of positive law, has its "existence, its activity, in the common consciousness, con-"viction, and inward sense or feeling of the people. "This existence is an invisible object. Through what "medium can we perceive it? We recognize it, in-"asmuch as it manifests itself in external acts, inasmuch as "it is exhibited in usages, manners, and customs. In the uni-"formity of a continued and enduring mode of action, we "recognize its common root, opposed to mere accident or "chance—the belief of the people. Thus, custom is the "sign by which we recognize positive law, not in its "original foundation. There is, however, in the erroneous "opinion which makes custom the original foundation of "law, a certain degree of truth which must be reduced "to nearly its just measure. Beside that generally re-"cognized and undoubted foundation of positive law, in "the consciousness of the people; there are also many "individual determinations, which in themselves have a

"less secure or certain existence. In order that they at-
"tain such a fixed existence, it may be necessary, that
"they be brought home to the people itself, by usage
"and practice, so as to produce a more distinct inward
"conviction. Such cases occur more frequently, in pro-
"portion as among a people the law-creative power is
"not pre-eminent. Besides, there is in the nature of many
"determinations, a relative equality of value, or indiffer-
"ence; and in such cases all that comes to be neces-
"sary is, that a fixed rule prevail, and that it be known
"what that established rule is. To this description belong
"the many cases, in which the rule of law contains a
"number in it; and in which, within certain extreme
"limits, there remains always a large field or space for
"the exercise of the will, for choice or option; as in
"the periods of prescription, and also in the rules of
"law which have for their object merely the external
"form of a deed or legal document or voucher. In all
"cases of this kind, our earlier judgments and anterior
"determinations become an authority for ourselves in every
"subsequent application of the rule in practice; and thus
"custom, as such, may certainly have an influence upon
"the formation of law. Here operates the law of the
"continuity of human thoughts, actions, and conditions;
"a law, which, in many individual legal institutions, is
"of extensive influence." (a)

(a) Translation of Dr. Jas. Reddie, in his *Inquiries in the Science of Law.*

Of the poet Cowper's beautiful popular compositions on the horrors of slavery, his fellow-poet, Campbell, with no less truth than feeling, said:—"Such appeals to the "heart of the community are not lost. They fix themselves "silently in the popular memory, and they become at last "a part of that public opinion which must, sooner or "later, wrest the lash from the oppressor's hand." (a)

The art, the wisdom of the legislator lies in fathoming, in understanding, in modifying, in profiting by Public Opinion (Savigny's 'basis,' 'common root,' 'belief of the people'), which, while an artificial, an organised legislature exists not, or exists but in infancy, may become chrystallized into Law, but which the statesman-legislator, if he do not anticipate, at least forestalls in its progress, and may do much to guide.

The more rude a people, the more inexact must be their laws, the more vague the boundary between legislation and judgment. Each branch of functionaries acts upon the other: a scientific judicial bench necessitates minute as well as comprehensive legislation; for, as a rule, it cannot but be, that, the more instructed and trained the judge, the more close does he adhere to his (more difficult and legitimate) doctrinal functions.

(a) With regard to one mode of evincing or expressing public feeling, an original thinker (Carlyle) has observed, (upon the instance of indignant cries of a mob):—"Great is the combined voice of men, the utterance of their instincts, "which are truer than their thoughts: it is the greatest a man encounters "among the sands and shadows which make up this world of Time."

In considering the legislative function of a State, a problem suggests itself, as to the extent, logically and politically, where no special rule defines a limit, of the abrogating and re-modelling power possessed by the political body in whom the law-making function is vested: *e. g.* can it change the fundamental constitution of the State, transform a monarchy to an aristocracy, or *vice versa?* Vattel thus solves the problem:

"—the authority of these legislators does not extend "so far, and they ought to consider the fundamental "laws as sacred, if the nation has not, in very express "terms, given them the power to change them. For, "the constitution of the State ought to be fixed: and "since that was first established by the nation, which "afterwards trusted certain persons with the legislative "power, the fundamental laws are excepted from their "commission. It appears, that the society had only re-"solved to make provision for the State's being always "furnished with laws suited to particular conjunctures; "and gave the legislature, for that purpose, the power "of abrogating the ancient civil and political laws, that "were not fundamental, and of making new ones: but "nothing leads us to think, that it was willing to submit "the constitution itself to their pleasure. In short, these "legislators derive their power from the constitution—"how then can they change it, without destroying the "foundation of their authority?"

In truth, when matters come to this pass, they are as much beyond juridical rule and compass, as the action of Man's will or even his physical condition is beyond the range of mathematical, or of any *formulæ.* In such a crisis, the coercive power of the Community is no longer under command of Law; unless, indeed, it be that *suprema lex* of political expediency and public safety which is decreed for or by the occasion. (a)

(a) The dilemma has certainly not seldom been met as insinuated by the well-known epigram:

Treason ne'er prospers—
What's the reason?
Why, when it prospers,
None dare call it treason!

—and, however met, in form or mode of action; subsequent acquiescence of the entire capable, deliberative will and conscience of the people, gives to the change jural significance and real authority. That acquiescence constitutes the ultimate basis and criterion of a nation's Law and of civil government. It is but decomposing the civil elements, and artificially reconstructing or re-arranging the system.

Constitution-mongers have ever found their chief difficulty in supplying corrective checks, inherent reformatory powers, practically indispensable in order to meet the morally erratic nature of all that depends on human will, but impossible of scientific pre-arrangement or control *a priori.*

Allen in his already often-quoted book, narrates:——"Notwithstanding "the zeal and success with which the monarchical theory was diffused over "Europe by lawyers and churchmen, there have been States where resistance "to the king was, in certain cases, sanctioned by Law. In Castille, if the "king attempted aught to his own dishonour, or the prejudice of his kingdom, "his subjects were entitled and even required by law to resist his will, and "remove evil counsellors from his person. In Aragon, the nobles enjoyed "what was called the privilege of 'union,' by virtue of which they were entitled "to confederate against the Crown, when any attempt was made by the "king to invade or encroach on their liberties. The Union was a legal and "constitutional association, authorized and regulated by Law. It issued its "mandates, as a corporation, under a common seal, and could make war on "the king, without exposing its members to the penalties of treason or rebellion.

ELEVENTH SECTION

INTERNATIONAL LAW—PUBLIC; PRIVATE

Law, with its sanctions and its procedure, has been examined and analysed, as the Rule of a Civil Community. But, Mankind are divided and subdivided into civil communities; and the Law of one community is not the Law of another, any more than the temper, the faculties, the mind of one man are identical with

"In England, we have one solitary instance of a similar institution. By one "of the provisions contained in the *Magna Charta* of king John, twenty-five "barons were to be elected, whose duty it was to take care that the liberties "granted by that monarch were observed. If any infringement of those liber- "ties took place, or if any injustice or oppression was committed by the "king or his servants, any four of those might remonstrate to the king, or, "in his absence, to the justiciary, and if redress was not obtained within "forty days, the whole twenty-five or a majority of them, were empowered "to make war on the king till relief was given to their satisfaction. All "persons were bound to assist this commission of twenty-five in the discharge "of their duty, and the only limit to their hostilities was not to touch the "persons of the king and queen or their issue. This guarantee of our national "liberties, which the cruel and perfidious character of John had probably "suggested, was omitted in the charter of his son, and therefore forms no "part of the *Magna Charta* of our statute-book."

As earlier checks upon and regulators of even constitutional power, may be noted the Roman tribunes, and a yet more remarkable institution, the *ephoroi* of Sparta; "—selected from the body of the sovereign people, whereby they "ranked as censors and judges above kings and people at once, with a power "which the Roman tribunes never possessed, they having endeavoured to attain "their highest aims by proposing laws, whilst the Ephors represented the laws "themselves. On that account they were only responsible to their successors in "office, and that imparts a peculiar significance to their dwelling beside the "temple of Fear. Their functions comprised the superintendence of public mo- "rals, with the right to impose fines, and exact immediate payment of them; "all matters connected with strangers, education, the scrutiny of magistrates, "whom they might censure, accuse or suspend; and their power in certain "cases even extended to imprisoning the kings." WACHSMUTH

the temper, faculties, mind of another man. Moreover, each community, or State, is a separate entity, self-contained, a Sovereignty, whether weak or strong, large or small, wise or foolish. So that, the world of humanity, as the planetary system, includes many independent orbs, social organizations, each turning on its own centre; but, all and each, subject and yielding to one centripetal force and necessity, inclining to the great moral centre, the sun and source of moral and of civil life, about which they all revolve. [a]

And, what says Grotius? "As the laws of each "Community regard the utility of that Community, so "also between different Communities, all or most, laws "might be established, and it appears that laws have "been established, which enjoined the utility, not of "special Communities, but of that great aggregate Sys- "tem of Communities. And this is what is called the "Law of Nations, or International Law; when we "distinguish it from Natural Law." (Whewell)

In truth, nations, like to individuals, are endowed with human dispositions, with human attributes; and therefore, nations associate, combine, quarrel, are reconciled, in fact live together and reciprocate benefits, much as individuals do.

(*a*) a sentiment well expressed by the author of ***Proverbial Philosophy*** (quoted *supra* p. 2): the 'permitted chaos,' however, *scil.* the mystery of Man's will, but seems to be chaos, it acts under control—else, how 'permitted'?

Here then, is a necessity for growth, for manufacture of laws. A subject of England has dealings, correspondence, commerce with a subject of France, with a subject of Persia, of Sweden—according to what system of laws are those dealings, their legality, their obligatory effect, to be viewed, to be regulated? A subject of one realm marries a subject of another realm—by what standard, are the validity, and civil consequences of the marriage to be measured? A subject of one realm dies, whilst residing in another realm, leaving property, *viz.* land, goods, debts, in each, and in a third realm—which realm's laws of inheritance and distribution of the effects of a deceased citizen, govern the succession to, and administration of the property so left?

Such questions, however, whilst their solution concerns the peace of more than one people or nation, are yet domestic; nor can any national scheme of law ignore them: unless indeed a State affect defiance to nature and to reason, and, in ignoring such matters, to ignore, also, the existence of their fellow-men and fellow-nations. Such suicidal vanity and selfishness of a nation can neither begin nor be carried out, but by accidental separation from mankind; it is abnormal, non-natural—moreover, it is self-corrective, as it compels the slighted ones to an aggressive assertion of those Rights (of brother-hood, of the social human bond), which precede and are irrespective of Man's laws.

The decision of such questions, by people who recognise and desire commercial and social relations with all the world's family, must, to be (as it must be) in accordance with the great standard, the moral law, have a wider base than purely domestic rules and questions: inasmuch as, such decision must necessarily and immediately affect foreign interests, the honour and the comfort of some who are, *primâ facie,* not bound by the decision, *viz.* the fiat of a foreign tribunal, of a Power to whom they owe no political allegiance. The working of that tribunal, the action of that Power, as affecting the interests and status of any subject of another State and Government, has certainly a relation to, and must, on many accounts, concern such State and Government.

There are, however, international questions not having the domestic element; questions of conduct of one people, collectively, towards another people collectively, *e. g.* extra-tradition of public offenders; respect to territorial boundaries; respect for natural rights, as liberty, personal safety, of the subjects of another State;—these are matters of statesmanship, of great moral and political importance, but, out of the range and sphere of a particular nation's domestic concerns, government or interests—that is to say, local interests: for, the foreign relations of a people must intimately concern and affect the welfare of that people, collectively and individually;

just as the happiness or enjoyments of a family circle cannot but be affected by their intercourse with the members of a neighbouring family.

Thus, Rules governing the intercourse of one organised people or community with another, are divided into two classes or branches:—

1. Rules which relate to the aggregate, collective action of each body, towards and with the other, the maintenance of the interests and the will of the one politic body in intercourse and collision with the interests and will of the other politic body, viewing each entire community as an individual: this is Public International Law.

2. Rules governing the intercourse of members of one politic body with those of another, individually; intercommunion of the subjects of different States, which immediately concerns only the individuals who are parties to the transaction, not other individuals of either of the collective communities to which they severally belong: these Rules are designated, Private International Law. A speciality, a proper quality of the latter is, that questions, doubts, disputes, arising under it, Rights conferred by it, wrongs in breach of it, are all brought before and disposable by the Courts, the regular municipal tribunals of either of the nationalities and States to which the parties belong, or of any other State. For, how could it be otherwise? If

a citizen of Persia have dealings, say, enter into a commercial contract, *e. g.* for sale or for carriage of merchandise, with an English citizen, and either of the parties break his contract,—it may be, that the wrongdoer is resident out of his country, in Russia, in Spain, in India, out of reach of his country's tribunals and their officers, and each State can, obviously, but act within its proper territorial limits. This is a matter of private Right: a State must either forbid, or, at any rate, ignore the occurrence of litigation and of all that may lead to questions of Right, of legal redress between the children of the State and foreigners, or, it must adjudicate such questions, must dispose of and terminate such litigation, as it would among those children themselves. So that, this class or head of law would seem to have nothing in it distinctive or peculiar, as respects either its general character or its sanction. What it has peculiar is, the foreign nationality with which it deals, which is involved in its administration. The English purchaser or seller, suing in England, upon the contract made in Persia, with the Persian, is clearly not (more clearly, ought not to be) in the same position, as though he were suing upon a contract made in England with an Englishman. Neither the Law-merchant nor the Statute-Law has much in common with the code under which the Persian was born and bred, and from which he borrows all he knows of the laws of contracting.

And this brings us to another subordinate head of jurisprudence, immediately connate with what we are now treating of, *scil.*

Conflict of laws; Comity of Nations.

The laws of England and of Persia may, in such a case, conflict, either as to the validity of the contract, or as to the consequent obligations of each party, so, as to what shall be deemed a breach. Here is a dilemma for the municipal judge, the English tribunal. The dilemma is either one of construction and of proof merely, *viz.* what the English judge, as such, may deem the contract to be, and whether or how infringed—or, it has a wider scope *scil.* whether and how far the foreigner's Law, the foreigner's views, both in construction and consequences of the contract, are to be taken into account. It may be, that the contract was entered into where the law of the *korân* prevailed, and yet, that its provisions were to be carried out where the French *code civil* prevailed (*scil.* goods to be delivered within the kingdom of France), and the party whose conduct is in question is an Englishman, before an English tribunal. Now, it is clear, some general rule and understanding is needed here—something distinct from the every day rules and procedure of the tribunal, the *lex fori.* No foreign State can be wholly indifferent to the treatment meted out to her citizens in such contingencies: moreover, opportunities of reciprocity must

occur. Hence, the comprehensive rule and guide in such cases, 'Comity of Nations.' This, as observed by Story, "is "the most appropriate phrase to express the true founda- "tion and extent of the obligation of the laws of one "nation within the territories of another. It is derived "altogether from the voluntary consent of the latter, and "is inadmissible, when it is contrary to its known "policy, or prejudicial to its interests. In the silence "of any positive rule, affirming or denying, or res- "training the operation of foreign laws, Courts of justice "presume the tacit adoption of them by their own "government, unless they are repugnant to its policy, "or prejudicial to its interests. It is not the comity "of the Courts, but the comity of the Nation, which "is administered and ascertained in the same way, and "guided by the same reasoning, by which all other princi- "ples of the municipal law are ascertained and guided."

The learned American jurist adds extracts from a judgment in the Supreme Court of his own nation, where we find,—"The cases of contracts made in a foreign country "are familiar examples; and Courts of justice have always "expounded and executed them according to the laws "of the place in which they were made, provided that "law was not repugnant to the laws or policy of their "own country. The comity thus extended to other "nations is no impeachment of sovereignty. It is the "voluntary act of the nation by which it is offered; and

"is inadmissible when contrary to its policy, or prejudi-
"cial to its interests. But it contributes so largely to
"promote justice between individuals and to produce a
"friendly intercourse between the sovereignties to which
"they belong, that Courts of justice have continually acted
"upon it as a part of the voluntary law of nations."
And, from that view and notion of 'comity,' maxims and rules in detail are evolved: these are discussed and explained with much learning by the author just quoted. (a)

In the code of France we read:—

"The laws of police and safety are binding upon all
"who inhabit the territory. Immoveable things, even
"those possessed by aliens, are governed by the French
"law. The laws concerning the condition and capacity
"of persons, govern Frenchmen, even if residing in a
"foreign country."—a declaration, that illustrates when and why a nation's scheme of Law binds.

It binds, where its coercive power reaches; it protects what it may govern: the proper arms of the State itself are no longer, can reach no further (unaided by other, foreign, arms) than its geographical limit; within which limit the State preserves the peace and prescribes rules for the people of its soil, for the State-

(a) *'Commentaries on the conflict of Laws, foreign and domestic, in regard to contracts, Rights, and remedies, and specially in regard to marriages, divorces, wills, successions, and judgments.'*

family. Its soil, *scil.* the material territory, and which (the land, the immoveable materiel, *locus* of the State,) is necessarily identified and one with the State, must be subject to those rules, and is not to be meddled or trafficked with at the bidding of a strange nation.

The State's power over members of the State-family who happen to be out of the State-arm's reach, *i. e*, in the territory of another State, can but be declared, as a dogma, a Right, and a reciprocal obligation; the enforcement of which, under those circumstances, must be, either, by tradition of the offender to his parent-State, or by some political action through the agency of the State where the absentee resides.(a)

But, as States, peoples in their collective, political capacity, have mutual (perhaps clashing) wants, reciprocal claims, complaints, demands—how are these to be dealt

(a) Rules of treatment, prescribed by the municipal laws of any State for that class of the State's subjects, inhabitants of the State territory, indigenous or temporarily, who do not come within the technical description of *cives*, citizens (by which we intend the original and proper community of any State) —whether these less-favoured subjects be, *perioikoi*, *metoikoi*, *plebs*, *peregrini*, *zimmee*, *mlechha*, *liberti*, *servi*, or *villani*, terms severally indicating a special origin or ground of inferiority—whatever policy or causes may influence or produce those rules, are, it follows from what has been premised, part of the general civil Law of the State, either strictly domestic or *quasi*-domestic; *e. g.* the law of the XII Tables, that, no stranger, no other than a Roman should benefit by the law of prescription, gain title by mere *usus*.

In all such matters, the voluntary or enforced 'comity of nations' (where the exceptional Subject has a distinct nationality), or else, the *jus gentium*, in a Roman view, *i. e.* a sense of the universal, moral Rights of Mankind, furnish a distinct and important element to guide the law-making authority, legislative or judicial as may be.

with, put forth, enforced? How must they be dealt with, as a question of jurisprudence, of the philosophy of Law? What part of the *leges legûm* applies here, or may regulate this inevitable chapter and phase of civil laws?

So may it be asked—how shall men be kept from acts of folly, from acts injurious to their mental or bodily health, as, habitual idleness of body or of mind, from waste of energies upon frivolous or mischievous amusements, from practising falsehood and deceit and sophistry in their social intercourse—from bringing pain and sorrow to their fellows? Here is the empire, the domain, of reason, of will, of divine sanction: hence occurs the inevitable reflection (inevitable and constantly recurring to the earnest student of jurisprudence),—

> "How small, of all that human hearts endure,
> "That part, which laws or kings may cause, or cure!"

A rule or law, of which the scope and object is, to govern inter-national dealing and intercourse, is, a law without any certain artificial sanction; inasmuch as, the parties disputant acknowledge no civil superior; each is self-reliant and independent (or would not be a sovereign power), and maintains the interest or Right contended for, without recourse to any paramount, any third referee or tribunal. Man's wit has yet devised no such tribunal: such a one is (there is but too much reason to conclude), even in theoretical conception, a mere utopian

phantasy. Whilst the weaknesses and the passions of human nature remain, and Man is no more than Man, *scil.* with an erring will, so long must 'war' be, the *ultima ratio regûm.*

Austin thus speaks of this class of laws or *quasi*-laws:

"—the Law obtaining between nations is not positive "law: for every positive law is set by a given sovereign "to a person or persons in a state of subjection to its "author.—The Law obtaining between nations is Law "(improperly so called) set by general opinion. The "duties which it imposes are enforced by moral sanctions: "by fear on the part of nations, or by fear on the part "of sovereigns, of provoking general hostility, and incur-"ring its probable evils, in case they shall violate maxims "generally received and respected."

Differing from the great jural philosopher in the use of terms merely; we would say, that, whilst the rules of intercourse, of mutual respect, of forbearance, of active good-will, between nations, must be, the rules of ethics, of morality, of reason—not secured, enforced, sanctioned, by any *rightly, lawfully constituted* human guarantee or power (—war is a convulsion, alas! permitted by, but not, to human understanding, to our frail, human comprehension, (a) in accordance with Divine omniscience and be-

(a) As we comprehend not the sweeping destruction of Vesuvius, the murderous lightning-stroke, the unequal distribution of physical and social suffering,

nevolence: however inevitable, it can never be, as war, morally justifiable—), yet, a large number of nations have agreed to and now adhere to a defined code of those rules.

the ease, the triumphs of the vile in heart and life! "Whence comes this "war of Good and Evil? Is this fair earth the creation of Omnipotence, as "wise as powerful—as beneficent as wise? If so, whence this jarring in its "else harmonious government? Whence these blotches which deform its god-like "countenance? Whence the tares which spring up so thick in the midst "of the wheat? Who shall read us this riddle?" From the same page where those anxious, those dread questions are propounded—questions not to be completely solved in Time—is a truthful and eloquent response, from which we are tempted to quote, though, of necessity, sparingly:—"With the aid of "experience, Man has learned to obviate many of the evils which beset him "in his earlier career, and to palliate all.——The mountain-torrents, which, "once, every shower converted into ministers of destruction, are regulated by the "art of the engineer, and become his servants; the subterranean agencies "which produce the volcano and the earthquake, are recognised as the labora- "tors of remedies for disease which baffles all other medicine. Nor is this "all;——Is Man himself the same after he has won this great battle "over the brute forces of Nature? Has his own spirit made no progress? "Compare the civilized Greek with the barbarian Canaanite, the polished "European with the wandering Calmuck, or Eskimaux, and observe how the "exigencies of existence have called forth all those wonderful powers of Man's "intellectual being, which lie latent in the breast of the wandering and "houseless savage. Remark how the necessity of combined action has produced "the complicated framework of law and polity; how these, again, &c. &c. "——nothing is more certain, nothing is more clear, than that the pro- "gress from the lowest barbarism to the highest civilization which history "can record, is due solely to the play into which the Creator of the Universe "has brought the human faculties by means of those very agencies which at "first seemed destined to overwhelm the species." JOS. WMS. BLAKESLEY

In the same focus of thought, though from a different point of view, are Hugh Miller's magnificent reflections upon and illustrations of Man's *rôle* as an 'improver of Creation,' a 'fellow-worker with the Creator.' We take but one sentence. "Man is the great creature-worker of the world,—its one "created being, that, taking up the work of the adorable Creator, carries "it on to higher results and nobler developments, and finds a field for his "persevering ingenuity and skill in every province in which his Maker had "expatiated before him."

Therefore, whether called, Comity of Nations, International Law, or Law of Nations, the rules themselves are positive, (a) and administered as positive Law: it is the sanction only, not the rule, which is, in the sense noted, uncertain, vague, casual—wanting uniformity and authority; these being incidents or conditions inseparable from the civil coercive function known to jurisprudence. The vengeance of the family of nations *should* attend upon infringement, by any nation, of any of those rules which they are mutually pledged to enforce.

Professor Twiss, however, observes: (b) "—the rules of "conduct which govern the intercourse of Nations, are "not improperly considered to form a body of Law strictly "speaking, as they have physical sanctions of no ordinary "character, in the consequences of War. The ruins of "Sebastopol bear convincing testimony, that this is not "a fiction of jurists, but a stern reality of international "life."

Conventions and Contracts, (usually called) Treaties, between States, bear nearly the same relation to the general body of customary rules, *viz.* International Law, that, in the Private Law of a State, contract-obligations bear to Law-obligations. Dr. Twiss ably remarks, with reference to the important and peculiar character of treaties

(a) They were usually alluded to by the great international jurist and judge, Lord Stowell, as, 'The use and practice of Nations.'

(b) In the Preface to his recent work *The Law of Nations.*

(in which peculiarity they are distinguished from private contract), *viz.* that their operation *may* extend to others than the parties; "—this indirect result will depend, not "upon the force of the Convention as a Contract, for "*that* only binds the parties to it, but on certain "considerations of Right (*Jus*) *dehors* the treaty; and "which may involve the nicest questions of International "Jurisprudence."

The learned author [(a)] of *An Enquiry into the foundation and history of the Law of Nations in Europe* (published at the close of the last century) thus delineates treaty-laws :—

"By Treaties and Conventions, I do not mean merely "those Agreements which men fell upon, in order to bring "about a cessation from War; but all those Deeds "(whatever they were), by which some uncertainty was "put out of doubt; some contingent difficulty smoothed "away; and the natural rights of mankind not unfrequently "trenched upon, in order the better to enjoy those that "remained."

"Amid the barbarous eruptions, and during those violent "throes which gave birth to the present States of Europe; "ferocity, and the right of the strongest were so predo-"minant in all operations, that men were extremely "irregular even in the savage customs which governed "them. They thought very little indeed of proceeding

(*a*) ROBERT WARD, Barrister (1795)

"upon any fixed rules, and still less of the refinements "which are generally their attendants. Some sort of agree-"ments no doubt they had, for the better conduct perhaps "of their military operations; and when exhausted in their "endeavours to destroy one another, they might be made "to comprehend the nature of a Peace, or rather of a "Truce. But, of the utility of those conditions which "were to decide upon future conduct, or which admitted "of any nicety in their construction, they seem never to "have been aware. It was reserved for the ages before "us, to witness the birth of those complicated interests, in "consequence of the growing connections and the conventions "of States, the knowledge of which it required no little "attention to obtain, and which in later times compose "that extensive and interesting science called the *Droit* "*Public*. Even in this period, the difficulty of settling "a number of contending rights among violent and unen-"lightened men was so great, that they were generally "induced to content themselves with mere Truces, and "nothing therefore is more common through all the "histories, than the 'expiration' or the 'renewal of the "Truce;' by this the contracting States agreed to quit the "character of enemies, though they could not become "friends, and so hard was sometimes the task of finally "settling an intricate contest, that a truce was actually "once entered into by Lewis XI and Edward IV to con-"tinue in force one hundred years after their deaths."

"—from the eleventh century, we have occasion to observe a number of Treaties (and those perpetually increasing) relative to the marriage of Princes; the exchange, or sale, or other settlements, of their dominions; the terms of their alliances; suffrages for the Emperor; or leagues for mutual defence. The connections of Society were extended, and the business of Europe began to thicken, as the laborious volumes of an infinite number of *Fœdera* bear ample witness. By these, the nations that were emerging from the grossness of ignorance, became acquainted with other modes than the savage one of War, by which to alienate, or exchange the sovereignties and dominions which they legally possessed. By these, they acquired a just power of taking part in one another's affairs, founded on rights, different from the brutal one of the strongest, which had hitherto governed them. By these, also, nations far distant were introduced into a friendly intercourse together; mutual prejudices began to give way; the ruggedness of one set of manners participated of the polish of another; commerce was extended; and even new States arose peaceably out of old ones, certainly without extermination, and almost without blood"

"—the points stipulated for by conventions are dependent upon the Law of Nations; not because the Law asserts that particular things are legitimate which

"are only rendered so by institution [*i. e.* settlement, "contract]; but because it can lay its finger upon what "shall not be legitimate. In this respect therefore it "bears a close resemblance to municipal Law."

The office and position of a resident 'ambassador,' are a personification and a guarantee of international polity, of what may be termed national affinity, brotherhood. (a)

The sacred character, the exceptional inviolability, of his person, of his dwelling, the exceptional immunity of his suite and household, from local jurisdictions, his exemption from State-charges: those special and positive privileges are, perhaps, the most real and practical development and type, where they exist, of an actual and positive law of international intercourse, not merely *jus gentium*, *i. e.* universal rule of right, but, *jus inter gentes*, a recognition of a distinct, a limited community, each individual of which is a body-politic, a people, a nation, under some common jural bond. (b)

(*a*) The same may be said of the Fecial College of Rome; strangely typical of the jural genius, the passion for legal formulary, of the old *Quirites*. The institution of the *feciales* was a significant acknowledgment, that a rule of right should be observed in intercourse with foreign peoples; they personified international *jus*, which it was their office to expound and to vindicate. Well may Ortolan exclaim:—

"N' est il pas surprenant qu'une nation qui ne vécut que des depouilles des "autres nations, qui commença par des peuplades qui la touchaient, et finit "par les peuples les plus éloignés, eût dans ses injustices des institutions pro-"tectrices de la justice et de la bonne foi?"

Histoire de la législation Romaine.

(*b*) Dr. Twiss defends the calling or practice of 'diplomacy' from a some-

In a learned and well arranged epitome of belligerent Rights and usages, (a) is noted a characteristic, essential distinction between ordinary Civil laws and international obligations or rules:—

"A statute, a despotic prerogative, and an established "principle of common-law, rest upon different sanctions "[*scil.* from international or universal law]. They may "be the causes of the greatest injustice, may sow the "seeds of national ruin, and yet may even require re-"volutions for their reformation; but any one of the "laws of nations preserves its vitality, only with the "essential truth of its principles; a change in the feel-"ing of mankind on the great question of real justice, "destroys it, and it simply remains an historical record "of departed opinion, or a point from which to date "an advance or retreat in the career of the human "mind."

what immoral mystery usually taken to enshroud if not to belong to it:— "—The true art of the diplomatist is shewn in easing the friction of inter-"national intercourse, and in smoothing the difficulties which may occasionally "embarrass that intercourse, either by candid interpretation of existing "treaty-engagements, or by negotiating the adjustment of a fluctuating prac-"tice upon a sound basis of conventional law. For this purpose, however, the "diplomatist requires not merely a technical knowledge of the general rules "which govern the intercourse of nations, but a perfect acquaintance with "the principles involved in those rules, and which must be respected in the "application of them; and it is indispensable for his success in administering "the Law of nations, that he should have mastered the elements of its "philosophy.

(a) *The laws of war affecting commerce and shipping,* by BYERLY THOMSON, B. A. Barrister

The proper, general, domestic Law, which it is the ordinary business of a tribunal to administer, and which must guide where no special or exceptional rule is imposed (such as, the Hindu and Musulman laws in the Indian charter-Courts), is known, among jurists, as, *lex fori,* the tribunal's law.

The Law which determines the personal status of any one, what is the 'personal law' applicable to him, his forensic nationality, depends upon a fact, a result, called 'domicil,' the *domus* or home. "Domicil is of three sorts; "domicil by birth, domicil by choice, and domicil by "operation of Law. The first is the common case of the "place of birth, *domicilium originis;* the second is "that which is voluntarily acquired by a party, *proprio* "*marte.* The last is consequential, as that of the wife "arising from marriage." (a) The second domicil, by which the original one is changed, depends upon the existence of *animus manendi,* intent to make a permanent residence, not a mere sojourn.

The Law which relates to things, to property, to locality of a subject of property, without reference to, irrespective of the personal status or domicil of any claimant or person, is called, *lex sitûs* or *lex loci rei sitæ.*

A further distinction, based on the same considerations, is, into, 'Personal laws' (dealing with persons, domicil,

(a) STORY

personal residence) and 'Real laws' (having regard to site, to fixity of property, *e. g.* lands.)

There is a branch of Law of a composite character, partaking, certainly, of the international (both private and public), and yet domestic and intrinsically municipal. Taken as a whole, the head or class of laws we shall now treat of, is peculiar and partial.

Maritime Law.

It has been said, that maritime, sea-bordering States have, alone, to deal with this phase of Law. But, are not commercial inland States concerned in the condition and observance of those rules which control the sea-carriage of exported and imported goods? This Law is, in truth, the key, as well as the bond of the commerce of the world.

It may seem, that, inasmuch as the concern of the several States, *i. e.* their citizens, in traffic, in voyages by sea, must be matter of contract, all that can be said upon this branch of Law, *i. e.* of any special character or significance, as distinct from or beyond what applies to ordinary municipal laws of Contract, is properly included in private international Law. Strictly this is so, and yet the prominent characteristics of this head of mercantile-law, of necessary jurisprudence, merit and require particular notice.

The Ocean is the high road of the world, a neutral boundary of nations, not within the territorial limit of any one State. A voyager, therefore, cannot but be, physically at least, deprived of the protection and companionship of the civil community to which he belongs: his position is special, territorially disconnected from all civil laws, committed to terrible risks, physical and moral; but,

> "The clime that feels the scorching sun,
> "The Northern isles, and frozen zone,
> "Can't fright the merchant from the sea,
> "Through which he cuts his liquid way:" (*a*)

nor can the 'dangers of the deep,' nor the yet more terrible dangers from lawless men. Each class of dangers come, directly or indirectly, within the range and purview of Civil Law, within the protective care and anxieties of every State—yet more so, than the contingencies of the common, though exceptional, case adverted to, of a Subject being temporarily at the mercy of some foreign jurisdiction.

Rights and laws connected with 'marine conveyance of persons and commodities,' may be described, and

(*a*) "—*neque fervidis*
"*Pars inclusa caloribus*
"*Mundi, nec Boreæ finitimum latus,*
"*Duratæque gelu nives*
"*Mercatorem abigunt; horrida callidi*
"*Vincunt æquora navitæ.*" HOR.

The translation is by the critics of Dr. Bentley's edition, and was published 1712.

divided, as;—property and rights in merchant vessels; reciprocal and respective rights and obligations of owners and of persons employed in or incidently connected with the navigation of the vessel, (and here may be ranged the guardianship or police of the seas); arrangements for conveyance of commodities, the relative rights and obligations of parties engaged in the contract of affreightment; salvage; average; contribution; exchange of imported commodities, and the series of transactions to which it gives rise; insurance; bottomry and respondentia; documents and law of exchanges.

Now, the above enumeration obviously belongs to the Law-merchant, the contracts and dealings of a particular class of every commercial State's subjects (and what State is not commercial now-a-days?), *viz.* the agents and arbiters of commerce. And this head of Law emphatically includes the 'comity of nations;' for, the whole business of a merchant (as distinguished from domestic traders) is, foreign intercourse, correspondence and dealing with Subjects of other countries, other States than his own.

Both Manu and Yajnavalkya speak of traders who make long journies and cross the seas in their calling, as an exceptional class, and as permitted to borrow at a rate of interest which, with others, was usurious and illegal. "For," observes an ancient Hindu commentator (a),

(a) VACHESPATI. See Jagannát'ha's Digest (Colebrooke), B. 1, par: XXXIII. The *trajectitia pecunia* of 'The Digest.'

"they settle greater interest, expecting large profit from "traversing the ocean."

In maritime contracts and usage, as in other respects, merchants have been, universally, permitted to establish, in many details, methods and laws of their own, which, in respect of their class-universality, are a chapter of Private International Law, although incorporated in Municipal laws of each realm respectively.

"Plato says, that in a city where there is no maritime commerce, there ought not to be above half the "number of civil laws: this is very true. Commerce "brings into the same country different kinds of people; "it introduces also a great number of contracts, and "species of wealth, with various ways of acquiring it. "Thus in a trading city, there are fewer judges (a) "and more laws. MONTESQUIEU

Commerce, of necessity, extends the empire of Law. A merchant is (taking a broad, unfettered view) twice a citizen, he has a two-fold status; once, in his domicil, the community where he was born, or to which he belongs; secondly, as a subject, nay, an officer, a minister of the universal commercial republic, peopled by his multifarious correspondents, his brotherhood (*i. e.* by affinity of caste, of mutual aims and occupation). He is truly a citizen of the world. Hence, the generic character of all laws (whether municipal or strictly in-

(*a*) *sed quœre.*

ternational) for the control or protection of dealings proper to the class Merchant, and those linked with, although not strictly of that class, *e. g.* bankers, brokers.

Neither have the commercial world, the great Merchant-Republic, as represented by the several State legislatures, been backward in promulgation of defined laws, *leges,* touching matters marine, whether as *a priori* regulations, or declaratory sanctions of established usage.

The marine code of Rhodes, the *Consolato del Mare,* the laws of Oleron and of Wisby, the Hanseatic code, the French marine *Ordonnance* of 1681, are names or titles of the most notable historic vestiges and monuments of that legislation; familiar to the modern mercantile jurist, as furnishing as well the basis as the materiel of the copious body of Maritime laws to be found in modern statute as well as consuetudinary-Law, in the *Code de Commerce* and in our English (complete though unscientific) code known as, the 'Law of Merchant-ships and Seamen.' (a)

(a) The following is a summary of the historic legislation referred to, quoted and collated from Reddie; whose elaborate and most interesting work on this subject, *Historical view of the Law of Maritime commerce,* should be carefully studied, even as a characteristic page of jurisprudence, well illustrating the philosophy of Law.

The orators, historians and philosophers of Greece, speak of various enactments regulating maritime commerce, protecting and controlling mariners, &c. The *Nautodicæ* were a special Court, at Athens, for disputed maritime contracts, whose rule of decision had a wider and more universal basis of construction than would be in the ordinary judicature. The maritime laws of Rhodes exist in somewhat more formal shape. At any rate, as shewn by Reddie, those laws were

Litigation involving international, maritime, and likewise proper or exclusively commercial disputes, has given rise

"compiled, digested, recorded in writing, and enacted by the supreme power of "the State, so as to form a body of positive and authoritative Law, so far as "regarded the citizens or subjects of that State and its colonics."

"Succeeding to the maritime power formerly enjoyed by the Phœnicians, "Athenians, and Carthaginians, there is every reason to believe they [the Rhodians] "also availed themselves of the maritime and commercial experience of these "nations, and collected the rules of practice which they had followed, and "compiled and digested the practical rules which they themselves had previously "adopted, about the time when the progress of their increasing manufacturing "industry, and the extension and greater frequency of their voyages, made them "feel more sensibly the necessity and expediency of such a code." The Roman Digest refers to the Rhodian maritime code. It is, however, very doubtful whether any portion of the genuine original text is extant: it can but be partially collected, in fragments, and from commentaries. That code was a pattern to the jurists of Rome, even under the Republic. Reddie considers, that Augustus, if not, Tiberius expressly incorporated the Rhodian laws into the Roman system: they were approved and confirmed by successive emperors; and they are worked in with the discussions and propositions of the Pandects. The *Corpus Juris* includes a code of mercantile-marine laws, not omitting the very important and technical heads of 'general average' and 'contribution for losses by perils of the sea,' ["*Lege Rhodia cavetur—Ut si levandæ navis* "*gratia jactus mercium factus est, omnium contributione sarciatur, quod* "*pro omnibus datum est.*" PAULUS] which are fully gone into.

Passing over the convulsions and confusion consequent upon the overthrow of the Roman empire; we find, in the middle ages of Europe,—Venice, Pisa, Genoa, Marseilles, Barcelona, conspicuous for recognition and statutory definition of laws maritime.

Then comes the famous *Consolato del Mare,* which Reddie thus introduces:

"The barbarous practice introduced by the northern nations who settled in "the Western Empire, of deciding causes by single combat, or other modes of "trial, by which the result was made to depend on force, chance, or contingent "events, very frequently to the subversion of justice and legal right, does not "appear to have ever been admitted, or to have had any influence in the de-"termination of maritime and commercial disputes. The judges in such matters, "whether denominated discreet men or *prud'hommes* or arbiters, consuls of the "sea, or courts of admiralty, appear all along to have admitted only proof by "witnesses or by writing; and to have been guided in their decisions by prin-"ciples of mutual justice, and especially by the traditionary rules of the "Roman law, with such modifications as experience, new wants, and new kinds

to a special class of Courts and jurisdiction, having a wider sphere and rule of decision than the ordinary mu-

"of transactions, had introduced. There was, therefore, a necessity for judges or "arbiters knowing the rules according to which they were to decide the suits, "of which the fate was to depend upon reason and legal right, and not upon "force or superstitious practice. Experience, and the repetition of decisions upon "cases which frequently occurred, naturally furnished the first materials for a "manual, destined not only for the judges who were to decide, but also for "parties, that they might know their rights and their obligations. By the "time, too, the *Consolato* appears to have been composed, not only Venice, "Pisa, and Genoa, but also Marseilles, Barcelona, and Valencia, possessed, under "the title of customs or statutes, bodies of legislation on maritime commerce, "the chief element of the prosperity of those cities. These statutes contain-"ed, independently of a number of rules of local police, many general principles, "of which it was necessary that practice should develope the mode of applica-"tion. Besides, the greater part of these statutes were written in Latin, "which language, though still familiar to lawyers, was already no longer that "of the community; and, consequently, the merchants, or judges and arbiters, "whom they chose from among themselves, had a great interest in possessing "a kind of manual which might guide them in their own business transactions, "or in the judgment of disputes which were referred to them.

"It must not, however, be imagined that the *Consolato* is a complete mari-"time code. It contains no rules on the loan of money at maritime risk, of "which several chapters indicate and presuppose the use, and with which the "statute of Marseilles is occupied in detail."

"Whatever may have been the causes which gave rise to the compilation of "the *Consolato*, the authors were, assuredly, well instructed in the principles of "the Roman law, of the *Basilica*, and of the legislation of the cities of France "and Spain which carried on the commerce of the Mediterranean, and of the "coasts of Asia and Africa."

"At the same time it is to be observed, that the *Consolato* sometimes pre-"sents decisions entirely different from the legislation anterior to or contem-"poraneous with its compilation."

It is a disputed question where this body of laws or rules was compiled; the proofs preponderate for Barcelona. Its date was probably, towards the close of the 14th century, or early in the 15th.

The contents have been ranged under the following titles:—

"*1st*, Of the obligations between the captain or master, generally a part "owner, the builder, or shipwright, and the persons who agree to become part "owners, relative to the construction and sale of the vessels; *2d*, Of the obliga-"tions of the mate of the vessel, of the clerk and keeper of the register or log-

nicipal Courts. Dr. Twiss thus treats of the Admiralty jurisdictions: "—whatever may have been the origin of the

"book, of the pilot, and of the crew of the vessel, or common mariners; "3*d*, Of the reciprocal obligations of the master and of the mariners or crew; "4*th*, Of the acts, contracts, and stipulations relative to affreightment, between the "master and shippers of the goods or cargo; 5*th*, Of the loading, stowage, and "discharge of the goods or merchandise, and of the damage which may be "occasioned to them by these operations; 6*th*, of the contracts by which vessels "were intrusted and given in use, or chartered for a particular voyage, or "by which goods were intrusted and delivered for a particular voyage, or for con-"veyance to a particular port of destination; 7*th*, Of the regulations for the "anchorage and moorage of vessels in a roadstead, on the sea-shore, or in "port; 8*th*, Of the mutual obligations between the owner or part-owners and "the master, the shippers of the goods or cargo, and the passengers embarked; "9*th*, Of the obstacles which may occur to the master, or the merchant-ship-"per of goods, commencing or continuing a voyage; 10*th*, Of voyages of mutu-"al preservation, and agreements by the owners and masters of different vessels "to afford each other aid and protection on particular voyages; 11*th*, Of ship-"wreck, of the running aground, or stranding of vessels and of the other "accidents and damage which occur at sea; 12*th*, Of damage caused to a mer-"chant-vessel by the attack of hostile vessels or pirates; 13*th*, Of the mutual "obligations of the master, of the part-owners, or persons interested in the "vessels; 14*th*, Of the observance of contracts, and of good faith in the sale "and purchase of commodities."

The *Roles d'Oleron* next claim our attention: "—like the inhabitants of the "coasts of the Mediterranean, those of the west coast of France, bordering "on the Atlantic Ocean, from their favourable situation, and in the natural "course of events, early addicted themselves to navigation, and made some "progress in maritime commerce. In the course of their own experience, and "in consequence, probably, of their intercourse with the more civilized maritime "States in the south, they were naturally led, from views of general conve-"nience, to observe certain usages, and to adopt certain rules of trade. And "these usages and rules appear to have been at last collected and confirmed "by the sovereign of the duchy or province of Aquitaine."

"—an ordinance of king John [of England] appears to be grounded on the "laws of Oleron; and the celebrated statute of the 43rd year of the reign "of Edw. III. known by the appellation of the Inquest of Queenborough, ap-"pears to recognise them as Common Law: in short, these laws may be "viewed as forming the basis of the English, as well as of the western and "northern French maritime jurisprudence."

"The denomination of *Roles or Rooles* by which this compilation is desig-

"institution of Courts of Admiralty, the forms of their "proceedings were undoubtedly borrowed from the Civil

"nated in all the ancient MSS. and editions, has been, for a very long period, "given in France to the acts or judgments of Courts or tribunals written "on parchment or rolls."

What is above narrated refers to the first (the ancient and genuine one) of the three divisions of what are now included in the *Roles d' Oleron.* "The "two articles composing the second part are clearly a French production "entirely, and are not of much importance. The third part, consisting of "the till lately unpublished eight articles in the Black Book of the English "Admiralty, inserted after the 24 original articles, obviously belong to England. "They appear to have been compiled in the reigns of Rich. I. or Hen. III.——"

"With regard to property in merchant-vessels, we find, from the *Roles* "*d'Oleron,* that part-ownership, or joint-ownership, was then very frequent; "arising, of course, from the scantiness of commercial capital in the hands of "single individuals; and we find it laid down as a rule, that, although he "could not sell the vessel in a foreign port, without the express authority of "the owners, the master might, with the advice of the mariners, impledge the "appurtenances of the vessel, in order to raise money for defraying necessary "expenses."

"With regard, again, to the relative rights and obligations of the owners, and "of the persons employed in and connected with the navigation of vessels, we "find various regulations and provisions in the laws of Oleron. The powers "and duties of the master are detailed at considerable length. The rights and "obligations of the owners and master, in relation to third parties with "whom an occasional intercourse takes place during the voyage, are also ex-"pounded. The rights of the mariners as to subsistence and wages are "explained; and their various duties in loading and unloading the vessel, in "the event of shipwreck, and on other similar occasions and emergencies, are "pointed out. The duties of pilots, too, are defined; it appears, indeed, that "in those early days it had not been unusual for pilots to enter into compacts "with the proprietors of the adjacent coasts to share in the profits of ship-"wrecks which they wilfully occasioned; and to repress this horrible offence, "the laws of Oleron enacted a severe and exemplary punishment."

"In the *Roles d'Oleron* the leading principles of the contract of affreightment "or charter party, are likewise distinctly unfolded. The owners and master were "held bound to fit out the vessel with sufficient sails, cables, cordage, and "other appurtenances. The master and crew were held bound to manage the "sails, and to navigate the vessel with skill; and they were held liable for "damage sustained through improper stowage, or through negligence in loading "or unloading the cargo. If the voyage was interrupted through accidental

"Law of Rome, and the rules by which they were go-
"verned were, as is every where avowed, the ancient

"damage, the owners were held entitled to freight, in proportion to the part "of the voyage which had been accomplished. And, if the master either got "the vessel soon refitted, or procured another vessel to carry forward the goods "to the place of destination, he was held entitled to the full freight. If the "vessel was detained through any delay on the part of the merchant, the "master was entitled to demand demurrage or compensation for the detention. "And, if the master was obliged, from necessity, to borrow money in a "foreign port, or to dispose of part of the merchandise on board, the vessel "became hypothecated to that extent."

"In the *Roles d'Oleron* the principles of the legal obligation of salvage, or "of remuneration for the labour bestowed in saving or recovering goods from "the perils of the sea, are likewise distinctly explained. And even the equit-"able principles by which general average is regulated, and the loss voluntarily "incurred for the benefit of the whole, divided among all the parties benefited, "appear to have been pretty well understood.

"In the *Roles d'Oleron* we also find traces of the contract of co-partnership "and joint adventure in the fishing trade."

With respect to the 'Laws of Wisby': "—not only does this compilation "belong to other times than those conjecturally supposed; it may also be "proved that it has had its origin in other places, and that we cannot, "without a violation of the rules of evidence, consider it as made at Wisby, "or for that city."

"The usages followed in the southern Netherlands under the name of "Judgments of Damme and West Capelle, whatever may have been their "origin, and those followed in the northern Netherlands under the name of the "usages of Amsterdam, were evidently known to the navigators of the Baltic. "From the thirteenth century, Lubeck and Hamburgh had mercantile establish-"ments in Flanders. At the outset they there enjoyed a jurisdiction over their "own countrymen, as a charter of 1349, of which Dreyer has published the "text, attests. Subsequently, the sovereigns of that country, in granting differ-"ent immunities to German merchants, obliged them to recognise the local "jurisdiction and laws:—'*Standum est consuetudini, et terræ nostræ legi.*' "These German merchants had thus an interest to know these laws; and, to "know them, they behoved to translate them into their native language. "This appears to explain how a translation into Low-German of the twenty-"four articles adopted in the southern Netherlands, under the name of the "Judgments of Damme, is found in the manuscript in the Dreyerian Museum "of Lubeck; why the manuscripts of Hamburgh contain the same twenty-"four articles, followed by the usages of the northern Netherlands; why these

"laws, customs, and usages of the Seas. There can "scarcely be a doubt that the Admiralty Courts of

"Low-German versions, though they quite correspond in the sense, differ in "the expressions; and, finally, why these manuscripts are not entitled, the "Maritime Law of Wisby."

"Different causes, all equally probable, could not fail to carry to Wisby a "collection of maritime usages which were practised in Flanders and Holland." The mixed compilation published, was probably for use of the Germans settled at Wisby.

With respect to the contract of maritime insurance, of which a mere semblance or trace is found in the Wisby collection, Reddie remarks:—"It is "more safe to rest upon the authentic evidence afforded by the ordinance of the "magistrates of Barcelona, in 1435, which establishes that this very important "maritime contract had been in use for some time previous to that date."

"The next general maritime code, in the order of time, is that of the "Hanse Towns. The association of these towns appears to have commenced "in the earlier part of the thirteenth century, and for more than 300 years "it was a most formidable maritime confederacy. This extensive and permanent "league of so many independent trading cities, scattered over the distant ter- "ritories of so many sovereigns, is a singular and interesting phenomenon in "the history of modern Europe;—"

"Towards the close of the fourteenth century, the confederated cities appear "to have undertaken the task of composing an uniform body of laws; of "which their peculiar statutes, especially that which Hamburgh and Lubeck "adopted, in almost identical terms, in 1276 and 1299, had laid the founda- "tion. The first *Recessus*, or ordinance, enacted by the congress on private mari- "time law, now extant, is not earlier than 1369.

"—the *Recessus* of 1614 which was drawn up by the syndic Domann, who "was charged with the task by the congress in 1608, has been, since its "date, known and generally cited as the *Jus Maritimum Hanseaticum*."

"—this code gives a fuller detail than the *Roles d'Oleron*, the Judgments "of Damme and West Capelle, or the Usages of Amsterdam, or the col- "lection formerly ascribed to Wisby, of the legal and equitable principles which "regulated the acquisition and transference of property in vessels, absolute and "limited; the mutual interests and duties of part and joint-owners; the "claims and security arising from the repairs and furnishings made in a home "or in a foreign port; the reciprocal duties, powers, and rights of the "owners, master, mate, pilot, and crew of the vessel, in relation to naviga- "tion, stowage, and wages; the relative rights and obligations of the parties "to the contract of affreightment; agreements of reciprocal aid in voyages; "the doctrine of damage from collision, of salvage and average, and the doc-

"England and the Maritime Courts of all the other "Powers of Europe have been formed upon one and

"trine of bottomry and respondentia. But, although the contract of bottomry "obviously implies an acquaintance with the theory of maritime risks, the "contract of marine insurance is not once alluded to."

"It was not till towards the close of the eighteenth century, and within a "short time of the termination of their existence as a separate independent "state, that the Venetians resolved to establish a complete maritime code for "themselves, adapted to their own peculiar local situation, usages, and views. "This great work, however, they at last accomplished, in the year 1786. The "code having been sanctioned in all its parts by the sovereign authority and "decree of the senate, was promulgated, in September, 1786, by the Magistracy "*de Cinque Savi alla Mercanzia,* under the title of *Codice per la Veneta* "*Mercantile Marina.* The arrangement of the matters is distinct, the doctrines "equitable and generally expedient, and the work is interesting, as one of the "later monuments of modern maritime leglislation.

"In 1774, the Empress Maria Theresa promulgated an edict, which forms "a tolerably extensive maritime code; and, in 1816, there was published at "Venice, *Editto Politico di Navigazione Mercantile Austriaca.*

"Florence, having become a maritime power by the acquisition of Pisa, "and more lately of Leghorn, established regulations for insurances, in the "years 1522 and 1528, which thus became the completion of the maritime "law of Pisa."

"In the year 1748, a concise edict was promulgated at Florence upon com- "merce and mercantile marine. To this edict additions were made in 1787; "and in 1798 there was published in quarto, *Collezione dei Statuti di Mer-* "*canzia di Firenze e di Liverno.*"

"In 1588 the Genoese undertook the composition of a new civil statute. "Some chapters were inserted in it relative to jetson and insurances. But 'from the silence of this code on other maritime matters, we may conclude "that the principal regulations of the *Statuta Gazariæ,* relative to the police "of navigation and sea-faring people, so far as they had not become useless, "or fallen into desuetude, from the more enlarged experience and the changes "of circumstances, continued to be observed by the magistracy, conservators of "the sea. The necessity, however, of establishing more precise rules, of such "a nature as to prevent frauds and other abuses relative to loans of money "on marine risk, appears to have been felt and recognised. The conservators "of the sea made a proposal on this subject, in 1644, to the legislative "council of the Republic: a statute on the subject was enacted, if not im- "mediately, at least in 1688, and it was renewed in 1707.

"the same common model, and that their jurisdic-
"tion, if not restricted by the territorial Law, includ-

A statute or body of maritime laws (of 97 chapters) appears to have been compiled, at Ancona, in the vernacular language, prior to 1397.

"The elements of this compilation, however, may probably have been borrow-"ed from more ancient statutes, which may have been composed in Latin "like the *Statuta navium* of Venice, in 1255, and may have been enacted "when Ancona carried on a prosperous commerce with Constantinople: and upon "perusal, it appears to be not so much a work begun and completed all at "one time, as a collection, in an order not very methodical, of distinct stat-"utes, made at different times on matters of maritime right."

"Of all the statutes established by the different maritime states of the "Mediterranean, those of Ancona treat most largely of the means of securing "to its native citizens the right of having the disputes between them in "foreign countries decided by their own judges, and according to their own "laws. The statute of Ancona treats also at length of the measures to be taken "for the preservation of the effects of its citizens who have died abroad. But "it contains nothing of insurances, although they must have been in practice "at Ancona in the sixteenth, and even at the end of the fifteenth century, as "the coasts of the Adriatic are mentioned in the ordinance of Florence on "insurances, in 1523."

"At Barcelona, marine insurance, as we have seen, may be traced back to "the commencement of the fifteenth century; and to prevent the frauds and "other abuses which even then had become frequent, certain municipal ordi-"nances were promulgated in the year 1435. These are still in preservation, "and consist of twenty chapters; and they relate chiefly to the articles upon "which, and the extent to which, natives and foreigners might be insured; to "the form and solemnities of the written documents by which the relative "obligations and responsibilities of the insurer and the insured were to be "ascertained; to the term of payment of the premiums; to the mode of "adjusting losses in general, and particularly average losses; and to various "other such matters, of which the *Consulado del Mar*, the maritime commer-"cial court, had an exclusive jurisdiction. But while by this public document, "the earliest of the kind in Europe, it is placed beyond doubt that marine insur-"ance was in practice at Barcelona early in the fifteenth century, it does not ap-"pear, on the other hand, that it was in general use in Spain in the year 1401. "In that year the king of Aragon granted a charter to the Barcelonese, which "has been preserved by Capmany, and in which that monarch confirmed former "privileges, and extended the jurisdiction of the *Consulado*, or commercial tribu-"nal of Barcelona, to all civil causes arising from mercantile contracts, whether "mercantile or not. In that charter, questions of co-partnership, of exchange, and

"ed all those subjects of which the Consular Courts "(*Consules Maris*) in the cities of the Mediterranean

"other such contracts are especially noticed; but no mention whatever is made of "insurance. Indeed, from the preamble of the Ordinance of 1435, it appears "that the business of insurance was first carried on under the public authority. "And from the precautions which appear, from the contents of the Ordinance, "to have been taken in relation to those enterprises—the care with which "the benefit of insurance was confined solely to such articles as were objects "of commerce to the people itself—and from the restrictions to which the "parties to the contract were subjected by government with regard to the "value of the things insured, the persons entitled to insure, the distance of "the voyage, the production and destination of the commodities—it is mani-"fest that the insurances of those days were the first essays in that line of "business, the rude beginnings of what was afterwards to form a great branch "of mercantile speculation. The ordinances just referred to however, were altered "by others, promulgated in 1458 and 1461, in consequence of experience having "shewn, in the vicissitudes of times, the necessity of correction and reform; and "by these the powers of the insurer and of the insured were enlarged, and vari-"ous restrictions, both as to the vessel and voyage, removed. Farther, in the "year 1484, the municipal magistracy of Barcelona promulgated another ordinance "on insurance, which repealed, or rather recast, all the former tentative or "experimental ordinances, which is arranged in twenty-five chapters, and the "object of which was to give greater security and facility to commerce, and "to render more expeditious and general that branch of business. And in "these later ordinances we discover greater enlargement of view, and greater "freedom from constraint, than in the earlier ones, according as trade was ex-"tended, and governments and individuals became more enlightened from expe-"rience."

"The Ordinances of Burgos were collected and formally promulgated in the "year 1563, under the sanction of Charles V; and they treat not only of "the fitting out and loading of vessels, but also of the forms of letters, or "bills of exchange, and of marine insurance. The last thirty-three chapters "relate entirely to insurance, presuppose other regulations on the subject more "ancient, and seem to imply that this kind of business was practised in that "state from an early period. In the year 1543, at the request of the mer-"chants and traders to the Indies, a court or council, with a peculiar juris-"diction, was established at Seville, for the regulation and determination of "all matters relative to that important branch of Spanish commerce. Soon "afterwards, in the year 1556, a long ordinance, consisting of a great many "chapters, was promulgated by King Philip II, for regulating the insurance "of ships and cargoes to and from the Indies. And in 1678, there were

"had cognisance, and with which subjects the Muni-
"cipal judges in those cities were forbidden to inter-

"published, in quarto, *Ordenanzas para il Prior y Consules de la Universidad "de los Mercadores de la Ciudad de Sevilla.*"

"The Ordinances of Bilboa were compiled and revised, and were approved "by the King, in 1737; and they were afterwards ratified in 1774. They "relate chiefly to averages, to bottomry and insurances, and to bills of ex-"change; with regard to which last the law is detailed at great length. And "by these ordinances chiefly are maritime affairs regulated on the coasts bor-"dering upon the Atlantic Ocean. The ordinances of the *Consulade* of San "Sebastian were reformed and approved by the royal council of Castile in "the year 1766; and in these, along with other commercial subjects, the "law of bills of exchange is also fully treated."

"The Portuguese had several peculiar ordinances of their own ancient "Sovereigns relative to maritime affairs, which were collected, confirmed, "and augmented, in the year 1643, by John of Braganza. Since that period, "ordinances relative to trade and navigation have, from time to time, continued "to be framed and promulgated by the Portuguese government; and of these "ordinances, ancient and modern, collections were published in the years 1747, "1752, 1767, and 1774, under the titles of *Ordinaçoes et Leys de Reyno de "Portugal*, and *Colleççao des Leys Decretos e Alvaras.*"

In the 'Low Countries,' "The earliest of the edicts, or *placaats*, was pro-"mulgated by the Emperor Charles V, who, by marriage, had become Sover-"eign of the Netherlands, in March 1537 for Brabant: it relates both to "bills of exchange and insurances; but the regulations relative to each of "these subjects are short and unimportant."

"The Ordinance of 1537 was succeeded by that of 1549; but the latter "relates more to maritime police, the state of maritime commerce at that "time, and the increasing number of accidents and losses at sea, than to "private maritime law. And, for remedying such evils and abuses, the Ordinance "directs how vessels must be fitted out, what must be their reach or burden, "and what the number of the crew, and of guns, according to the countries "for which they were destined, and the description of merchandise with which "they were to be loaded; enjoins the master to enter into agreements for "mutual assistance and defence; provides for the inspection of vessels before "they sail, to ascertain they are seaworthy, and to prevent overloading; regu-"lates contracts of affreightment between the shippers and captains; admits the "intervention of the officers of the port to reconcile their differences; pro-"hibits the loading in foreign ships when native ships can be procured; prohibits "borrowing on bottomry, except in some cases; recognises insurances; treats "of the prohibition of commerce with the enemy, of letters of marque, and

"meddle. These Courts are described in the *Consolato* "*del Mare* as having jurisdiction of all controversies

"privateering; recognises the rights of natives to reclaim the property of "goods taken by pirates; and prohibits captains from allowing their ships to "be boarded except by friends. This Ordinance of 1549 was replaced by "another of 1551, compiled by the Chancellor Viglius, and divided into two "parts: the first reproducing the Ordinance of 1549 with some variations; "and the second devoted to private maritime law——In the reign of Philip "II, King of Spain, who succeeded to his father, the Emperor Charles V, "as Sovereign of the Netherlands, and whom the recent discoveries of Colombus, "and Vasco de Gama, contributed to render the most powerful monarch in "Europe, the Ordinance of 1551, was replaced in its turn by that of 1563, "likewise compiled by the Chancellor Viglius. The first title contains, "with some additions and variations, the first part of the Ordinance of 1551. "The following titles reproduce, with additions and changes, the second part of "the Ordinance of 1551; embracing the legal doctrines relative to shipwrecks, "average losses, damage done in the course of navigation, the legal obligations "of the masters of vessels and mariners, and, particularly, in more full deve-"lopment, the law of marine insurances, which were then practised more "at Antwerp than in almost any other city of Europe.—It may easi-"ly be believed that great abuses must have taken place, when, by an edict "in 1568, Philip II. prohibited all kinds of insurance. But he revoked that "edict in 1569; and a new and special ordinance on that subject was, in "1570, promulgated by the Duke of Alba in the name of the King."

"In the Southern Provinces we find the Custom of Antwerp of 1582, rela-"tive to insurances, against wager-policies, &c., and the Custom of Ostend of "1610, relative to the conveyance of goods in vessels. But the most important "of these municipal ordinances are by the different cities of the United Pro-"vinces. Thus we find the statutes of Amsterdam of 1527, on bottomry; "the Ordinance of Amsterdam of 1598, on insurances and averages, and on "the commercial court for the decision of such questions; the Ordinances of "Amsterdam of 1606, 1607, 1610, 1614, 1620, 1621, and 1626, relative to "insurances, averages, payment of premiums, bankruptcy of underwriters, and the "summary mode of procedure for the settlement of such disputes; the Ordi-"nances of Amsterdam of 1682, 1687, 1688, 1693, and 1699, relative to con-"signments of goods, bills of exchange, bills of lading, sale of vessels by "part-owners, and specification in the policy of insurance. And the Ordi-"nance of 1598 was renewed, and still farther improved and augmented, "particularly in the years 1744 and 1745, as collected by Magens.—Again "we have the Ordinance of Rotterdam of 1604, renewed in 1635, relative to "insurances, averages, insurance-brokers, commissioners for the trial of such

"respecting freights; of damages to goods shipped; of "the wages of mariners; of the partition of ships by

"questions, and another Ordinance, in the year 1655, relative to maritime affairs "in general. And both these ordinances were renewed and enlarged in the "year 1721. This last ordinance is comprehensive and pretty well arranged; "and treats not merely of averages and insurances, but also of the reciprocal "duties of masters and mariners, owners and freighters. Again, we have the "Ordinance of Middleburgh of 1600, on averages, insurances, and summary "procedure in commercial tribunals, and this ordinance was afterwards renewed "and improved in 1686 and in 1726."

"Louis XI. by an *Ordonnance* of September 1463, conferred judicial functions "upon the *Consuls de Mer* of Montpellier."

"Although, neither the laws of the German nations who took possession of "Gaul, and there founded the empire of the Franks, nor the capitularies of "the second race, present any proper texts of positive maritime legislation, we "must not from thence conclude, either that the provinces situated upon the "ocean carried on no maritime commerce, or that they had no rules for the "regulation of mercantile contracts, or for the decision of disputes resulting "from commerce. It appears from the Collection of Capitularies, that the "Counts charged with the protection of the coasts decided, with the assistance "of certain discreet men, (*prud'hommes*) or *Scabini*, the disputes to which "maritime affairs gave rise."

"In proportion as the Kings of the third race, among whom Louis XI. in "this respect distinguished himself, succeeded in uniting the great fiefs to the "Crown, they confirmed the jurisdiction which had belonged to the great feu-"datory princes upon the admiral of France; or, if they found it expedient, "to respect the rights of some great lords, or of some cities, they established "an appeal from the tribunals of the latter to the royal courts. This was "affected by the *Ordonnances* of 1350 for Normandy, and generally by the "*Ordonnance* of Charles V. of 1373, usually designated as of the date 1400. "The jurisdiction of the admiralty received a farther extension, by empower-"ing it to judge in all the causes, although not commercial, of the foreign "merchants who, in the course of the thirteenth and following centuries, were "not only permitted, but encouraged by great privileges, to settle in France; "and this jurisdiction of the admiralty was recognised and confirmed by the "subsequent *Ordonnances* of Charles VIII. in 1490; of Louis XII. in 1508 "and 1511; of Francis I. in 1517 and 1543; and of Henry II. in 1555."

"—the Edict of Henry III, of March 1584, remodelled the former laws, "and recast them into one entire body, which maintained its authority until "the promulgation of the celebrated *Ordonnance* of 1681.——In the *Ordon-"nance* of 1629, of which Marillac was the author, various articles were insert-

'public sale; of jettison; of commissions or bailments 'to masters and mariners; of debts contracted by

"ed, tending at once to establish order in the royal military marine and a "good police in mercantile navigation, also settling some points previously undecided; "and, under the direction of the same able minister, there were afterwards "prepared drafts of different edicts and regulations relative to these subjects, "which, although not promulgated, served nevertheless to contribute towards the "subsequent legislation. From the leading objects of the different *ordonnances* "before mentioned, it was not to be expected they should contain almost any "rules for the guidance of individuals in their business transactions, or of judges "in their decisions of litigated questions. And the Edict of 1584 and the *Ordon-* "*nance* of 1629 are the only ones which contain any articles on private maritime "law; but these rare and brief regulations evidently presuppose the existence "of a common-law preserved by tradition, by local statutes, and by judicial "determinations; and it cannot be doubted that, in the provinces of France "situated upon the ocean, the law consisted in what we call the *Roles d'Oleron.*"

"It was reserved for the genius of Colbert to perceive the advantage of "collecting and arranging all the materials of maritime law before enumerated, "and of forming out of them a code which might complete the laws already "in existence, and, at the same time, reconcile and digest the variety of an- "cient usages into one consistent and uniform body of positive legislation. This "was accomplished, under his care, by the *Ordonnance* of 1681."

"Of all the enactments of the French Kings, relative to maritime law, this "*Ordonnance* is the most important. The plan is methodical. It is divided "into five books. The first treats of the admiral, of his droits, powers, and "rights; of all the institutions having for their object the police and the "protection of maritime commerce, and of the jurisdiction which was then "vested in the office of admiral: the second, of persons employed in maritime "commerce, and of property in vessels: the third, of maritime contracts of "every kind: the fourth, of the police of the harbours and sea coasts: the "fifth, of marine varech, sea weed, sea wreck."

Of the trading cities of Germany; "the most ancient monument of the laws "of Hamburgh which is known, is a series of 28 articles, to which it is "generally agreed to give the date of 1270.—When, in 1497, the city of Ham- "burgh compiled and digested of new its civil statute, a special title was devoted "to maritime law. The articles of 1270 and of 1306 were then recast in a new "order, and with additions which, notwithstanding the numerous matters "borrowed from the former statute, formed a new work. The compilation of "Wisby, or at least the second and third parts, borrowed from the southern and "northern Low Countries, appear to have previously served at Hamburgh as a "kind of subsidiary Law: and the compilers of the maritime statute have

"the master for the use and necessities of his ship; of "agreements made by the master with merchants, or by

"borrowed much from these different documents. In 1603, Hamburgh again "revised its civil legislation: and the thirteenth title of the second part of "the statute of that date is allotted to maritime law.—"

"The Magistracy of Lubeck did not delay the exercise of the privilege, "granted them in 1188, of revising and improving their legislation; and a "statute was enacted in 1240, which contains twelve articles on maritime law, "and of which various copies appear to have been made towards the close of "that century.—In 1582, the inconveniences resulting from the circulation of "copies of collections of civil laws differing from each other and unauthenticated, "induced the senate of Lubeck to employ commissioners to draw up a regular "digest. This work, promulgated in 1586, is divided into six books, of which "the last relates to maritime law——Subsequent to the statute of 1586, "there was enacted at Lubeck, in 1655, an ordinance on the manner of "adjudicating maritime disputes."

"In the year 1669, the city of Dantzic, and, about the year 1730, the city "of Königsberg, established and promulgated their respective statutes relative "to the laws of navigation and maritime commerce."

"Norway does not appear to have had any proper legislative code of mari- "time law till that promulgated by Christian V. in 1687."

"From the cities of Wisby, and Birka, and Stockholm, having had particu- "lar statutes containing rules of maritime law, the idea naturally occurred of "compiling from them the common principles to form a code to which each "city would only have to make such additions as its localities required. This "seems to have produced in Sweden the *Stadtlagh*, or Code of the cities. "And in 1618, Gustavus Adolphus, having caused the most ancient and au- "thentic manuscripts to be collected and carefully compared with each other, "ordered the publication of an official and authoritative text of the *Stadtlagh*, "which received the appellation of *Legislerium Suecia*, and contains a pretty "extensive title on maritime law.——"in 1667, Charles XI. caused to be digested "a special code of maritime law, which still governs Sweden, with the excep- "tion of the first part, relative to the crews and police of vessels, modified "by the enactment of 1748, and of the sixth part, relative to averages and "marine insurances, modified by the enactment of 1750.

"The earliest maritime law of Denmark is to be found in the municipal "statutes of the different towns or provinces, and the subsequent usages "which were adopted for the purpose of modifying them, and, more frequently, "of supplying their defects. The most ancient of these municipal statutes is "that of Sleswick, about the beginning of the thirteenth century, which con- "tains only a small number of rules of maritime law; and this statute was

"merchants with the master; of goods found on the high "sea or on shore; of the armament or equipment of

"adopted by Flensburg in 1284, with some slight changes. About the same "time, also, Apenrade adopted the statute of Sleswick; and, in 1292, Hader-"sleben also enacted a statute, in which a good deal is borrowed from that "of Sleswick. In 1240, a civil code was established for Jutland, but did not "supersede any previous municipal rules of maritime law, of which there are "few traces in this code. In Holstein, the city of Kiel, in 1232, and the "town of Ploen in 1236, adopted the law of Lubeck."

"Frederick II. who holds a distinguished rank among the legislators of Den-"mark, in 1561, promulgated a maritime code destined for the regulation of "all his dominions, including Norway.—The Code of 1561 was followed by "special laws on particular points, which had not been foreseen; such as, a "law of 1638 cited by Loccenius, *De Jure Maritimo*, prohibiting the sale of "a vessel for a certain number of years after its construction. But these "special enactments, and whatever else composed the maritime law of Den-"mark, were united and embraced in the fourth book of the code of civil laws "which Christian V. caused to be compiled and promulgated in Denmark in "1683, and in Norway in 1687.—In 1803, the Danish government promulgated "an Ordinance for regulating the conduct and fixing the obligations of its sub-"jects, both merchants and seafaring people, during the time of war, among "the other maritime powers. And, in the course of the same year, another "Ordinance was published, concerning the salvage of vessels and goods ship-"wrecked on the coasts of Holstein and the other Danish provinces."

The general codes of Russia do not contain any articles on maritime law: each maritime city had its own peculiar statutes and usages. "And with re-"ference to Novgorod, there exists a compilation under the name of *Skraa*. "Among a number of articles of police and local arrangements, foreign to or "unconnected with general maritime law, this compilation presents very impor-"tant provisions upon the respective obligations of seamen and their employ-"ers; upon jetson and sacrifices made for the common safety; upon the "obligations of the master, who undertakes the conveyance of merchandise. "This document, however, properly speaking, does not belong to Novgorod. "It is not the work of magistrates or of any public authority in that city, "which exercised the power of making laws binding on the Russians. The "German and Gothland navigators and merchants, in early times, obtained at "Novgorod a sort of territorial colony, where they were governed by their "own laws, administered by their own magistrates. Previous treaties, or, at "least, grants of privileges, emanating from the native Sovereign or local au-"thorities, were necessary to ensure the safe exercise of this franchise. And a "previous treaty, and other documents, prove that it was in full activity in

"ships, galleys, or other vessels, and generally of all other
"contracts declared in the customs of the sea.—

"1280, and the following years. The object of the compilation of the *Skraa* "was thus merely to govern a body of mercantile people, strangers to Russia, "admitted to reside there, for the purpose of carrying on trade, and is evidently "the exclusive work of foreigners to Russia. But it is certain that it was "composed for the purpose of receiving its execution within the Russian ter-"ritory. And, from the character of universality which belongs to maritime "law, it is highly probable that the provisions of this compilation served also "as rules for such of the native inhabitants of Novgorod as applied themselves "to maintain traffic, seeing in that department their own civil law was silent. "—the result of the learned researches of M. Lappenberg, and M. Pardessus, is "to hold this document as of the date of 1229, 1231, or, at least, in the "earlier part of the thirteenth century."

"Pufendorf has published, as a statute of Riga, a text which bears such a "strong resemblance to the most ancient statute of Hamburgh of 1270, that it "is scarcely possible not to believe that it was borrowed from the latter "city. But if the magistrates of Riga borrowed the statute of Hamburgh, "they did so with discernment, and modified and adapted it to their "own particular circumstances; and they afterwards composed a statute "for themselves, towards the end of the fifteenth or beginning of the "sixteenth century. After having passed under the dominion of Poland, "the city of Riga was conquered from that kingdom by Sweden in 1621. "And, while it was under the latter government, it subjected its statutes to "a revision, which appears to have been completed in 1672, and the result of "which was the code still in force in that city. The maritime laws contained "in the fifth book of the statute, are much more extensive than in the pre-"ceding statutes; and the regulations are in general borrowed from the statute "of Hamburgh of 1603, although they contain traces of an existence anterior "to the Swedish domination."

The Empress Catherine II. of Russia, "in 1769 published her own instruc-"tions to the commission charged with the preparation of the *projet* of a "new code of laws. And, in 1782, she promulgated the body of mercantile "navigation laws, according to which the Senate and the Custom-House Court "of St. Petersburg were to dispense justice between the merchants, traders, "and seafaring people, and which is distinguished by the wisdom of its provi-"sions. Between the years 1780 and 1790, Catherine also promulgated an ukase "on the law of privateering, and entered into conventions with other maritime "powers for the establishment of a general maritime code, which should ascer-"tain in future the rights of neutrals during war, and should put an end to, "or, at least, limit, the exercise of certain powers which other belligerent

."The Admiralty Court exercises a voluntary jurisdiction "in time of Peace *ad instantiam partis,* and is in "such matters termed an Instance Court; whilst in "time of War it exercises a compulsory jurisdiction "over all the commissioned vessels of the Crown, which "are required to bring their captures before it, in order "that the Admiral or his Lieutenant may determine "whether such captures are good Prize of war or not. "The Admiralty Court is for such purposes termed a "Court of Prize, and its functions are not merely to "administer the Law of Nations as between the belli-

"maritime nations claimed as right.—A new general code of private law, how- "ever, was promulgated by the government of Russia some years ago, of "which a considerable portion is allotted to private maritime and commercial "law."

"—it must be admitted that the improvement in the maritime and com- "mercial law of England has not all along, or altogether, kept pace with "the vast extension of commerce, manufactures, and navigation. Even at this "day [1841], England cannot, like many of the other European states, boast of "having a well-digested and systematic maritime and commercial code. In the "Statute Book we find merely detached enactments of the legislature appli- "cable to particular branches of trade and navigation. Parliament has never "sanctioned any general systematic compilation of maritime and commercial "regulations such as that executed in France under the auspices of Colbert. "The great body of the maritime and commercial law of England must be "sought in the decisions of the different courts of justice; and these decisions, "ofcourse, being merely the judgments pronounced in particular cases, do "not present what can be called an authoritative collection—a digest of ge- "neral principles.—The privileges of British vessels, the description of vessels "entitled to these privileges, and the transference of property in British vessels, "have all been regulated and ascertained by a series of statutes which have "been passed, from time to time, since the middle of the seventeenth century, "and are known under the general appellation of the navigation laws; and these "statutes, it is well known, originated in state policy; the object of these "being to increase British shipping, and to secure, at all times, a supply of "seamen for the national navy, the natural bulwark of an insular empire."

"gerents, but the Law of Nations as between the belli-"gerents and neutrals." (a)

TWELFTH SECTION

CONCLUDING REMARKS

In a great degree, in a most important and practical point of view, jurisprudence is an empirical science or study. What men and nations have done and have been, they will do and be again, and yet again. The principles in this treatise inculcated, traced out and explained, whatever force or approval they may derive from reflection and reasoning, from individual, personal experience of Man's nature, characteristics and wants, are best supported and proved, as they are illustrated, by observance of the ts and ways of Mankind, in all Time and in all

(a) With respect to general commercial tribunals: "Les membres des tribunaux "de commerce seront élus dans une assemblée composée de commerçants notables, "et principalement des chefs des maisons les plus anciennes et les plus recom-"mandables par la probité, l'esprit d'ordre et d'économie." *Code de Commerce*

places—the records of the world's nations. Thus are we furnished with a cumulative, belief-compelling 'experience' intended by (or included in) the dogma of that honest and profound looker into Nature, Hugh Miller, *viz.*

"—it is from Experience, and Experience only, that we "know any thing of Natural Law." And this is as true of the moral as of the physical or material world.

History's ample page is the mirror, rather the photographic impress of humanity. No less in the moral, than in the physical universe, is it a postulate, a primary truth—what has been, will be; another, a collateral truth being—civil laws are (as a rule, and immediately or mediately,) results of popular feelings and opinion (a)

In regard to those general principles, the main arteries of this great social science, whose stream is from the heart and centre of moral vitality,—although, true it is, they may and must be discovered, be deduced, be known and proved from the workings, the living organization of History; yet is it no less true,—ere these were, those never ceased to be—a sentiment forcibly expressed and illustrated by an indefatigable searcher in the mine of History, Montesquieu, *viz.* "Particular

(*a*) "Popular character has its soil, its intellectual soil in History, out of "which it springs: it has its intellectual climate in Language, in which it "lives and moves." Professor SCHOUW (Henfrey)

"intelligent beings may have laws of their own making, "but they have some likewise which they never made.— "To say that there is nothing just or unjust, but what is "commanded or forbidden by positive laws, is the same as "saying, that, before the describing of a circle, all the "*radii* were not equal."

'When' said Ulpian, personifying his State, 'we add anything, or subtract anything from the Common Law of Mankind; then it is, we contrive a law proper to ourselves, *jus civile.*'

History is the most effective exponent of Moral Truth; but, History is not that Truth. (a)

In the preceding pages, it has been attempted to scan and broadly to delineate the domain of jurisprudence, marking the province and applicability of those general truths, which go to form the science, in its main features and divisions. Starting from the simplest and most obvious propositions, concerning the origin of Civil Society and Civil rules of conduct, these, in their inevitable order and branches, have been analysed, not ex-

(a) "—l'histoire renferme l'expérience du monde et la raison des siècles. "Nous sommes organisés comme les hommes des temps les plus reculés; nous "avons les mêmes vertus, les mêmes vices. Entrainés comme eux par nos "passions, nous écoutons avec défiance les censeurs qui contrarient nos penchants "et qui nous avertissent de nos erreurs, de nos dangers. Notre folie resiste "à leur sagesse, nos espérances se rient de leur craintes. Mais l'histoire est un "maître impartial, dont nous ne pouvons réfuter les raisonnements appuyés sur des "faits. Il nous montre le passé pour nous annoncer l'avenir: c'est le "miroir de la vérité." COMTE DE SE'GUR

haustively, but, so as to supply definite *data* for enquiry and research. Furnished with those *data*, the student should not be at a loss for either way or means to progress. He may proceed, as his taste, as his plan of life may lead him, *viz.* either to follow up the abstract, rather, general science, by combining philosophical reasoning with records of history and of travel, (a) tracing the beginnings and the progress of each national jural scheme, the harmonies and the discords of each,—or, as must usually be, the student will at once proceed to put into requisition, will use the key of which he is possessed (*scil.* his familiarity with legal principles, bases, analogies), to open out and to make his own, the *arcana*, the plans, the ways and methods of that particular system which is to be the theatre of his

(*a*) "—le concours fécond de la science philosophique, d'abord, et de la "science historique en second lieu." ORTOLAN

The philosophy of progress must be the student's aim, what he has to trace and to record. Nor can he, in this pursuit, altogether neglect accounts and theories of physiological type or development: *e. g.*—"The periods," says Dr. Verity, "in which the empires of old sprang up, shone in the ascendent, and attained "to their partial civilization, seem of short duration compared with the slow, "oak-like growth of that of modern nations. They would appear like forced "and imperfect creations, shooting up rankly and luxuriantly for a time, but "prepared soon to break down and decline, from drawing their supply of nourish-"ment out of a range of elements too restricted to afford a continuance of ex[illegible]-"ment and health. The stimulus of some species of aggression or conquest, "was the very condition of their existence." "—this deficiency resided in the "intellectual and humanitary nature of ancient society; a deficiency perfectly con-"formable to corresponding wants in the Roman, Greek, Egyptian, and Hindoo "types of cerebral system, *viz.* their inferiority to the Germanic type in the "upper convolutions, and coronal region of the brain."

Changes produced in the Nervous System by Civilization (1839)

labours, the fulcrum of his ambition. If this be the student's path, we would certainly not counsel him to devote his earlier energies to any abstruse discussion of any prolonged research into General Jurisprudence or Law-Philosophy. Such may be the grateful recreation, the *otia in negotio* of his maturer years. For the nònce, let him but master (not merely dabble in, or skim over) the elements and outlines which may fit his mind for reception of legal propositions and their application, for grappling with the rugged task-work of the Courts. Thus, as the disciple and servant of Justice, will he have learnt to bring into exercise the principles and maxims of jurisprudence: the structure, the garner of his professional acquirements (—his pleading, his conveyancing, his rules for admission and handling of proofs, his laws of contract and of property—), he will then assuredly find, is not a baseless thing of postulates and of dogmas, but an orderly development of logical sequences, of which the premises are easily deduced by him, intrinsically and originally, from what he knows.

In conclusion: it will much facilitate the professional student's application, and aid his memory of juridical principle, if he attentively scan the history, and familiarise himself with the scheme, of Roman jurisprudence. In this field of conquest, Rome is yet mistress of the world. No modern European code is independent of the maxims,

the land-marks, the leading divisions, the nomenclature of that scheme. A great deal which, in itself and *primâ facie*, may seem arbitrary or inconclusive, is at once resolved and accounted for by the learning of the *Corpus Juris.* Rome, from her precise and prædatory beginnings (when her *jus* was but 'rigid and imperious command, technical and unbending routine, a patrician weapon and mystery' [a]) to her final progress under Justinian, was a school, a practice-ground, a gymnasium for jural thought, ideas, propositions—not to devise or originate, but, in part recognising and adopting, in part reasoning out and discovering; always, however, and untiringly applying, with systematic skill and discipline. This her task, accomplished once for all, remains a monument and lasting benefit to the nations. A student who has learnt to know, to appreciate that task and its fulfilment,—the chief mission of the mightiest embodiment of Civil power the world has seen—will, as of-course, be led to trace the history of Rome's legacy of principles, their occasional abuse and misapplication, and, anon, their new and further development, as well as their co-operation, their confluence and their antagonism with differing veins of jural thought and polity, even from the period of Rome's decay to the times in which

(*a*) "ordre imperatif et dur (*jussum*), formule technique et rigoureuse, mystère et arme aristocratique." ORTOLAN

we live.[a] In this treatise, those middle times (*scil.* of confluence and antagonism,[b]) have been glanced at, so as, it is hoped, to throw light upon the subject treated of, and to stimulate research. Many pioneers of jural literature have all but denuded this path of study of obstacle or difficulty.

A favorite maxim in the Courts may well be brought in aid of, and furnish apology for the law-student who resorts to the *juris-prudentes* of Rome—'Rather trace up to the source, than wander by the rivulets.'[c] To do so (in the sense here suggested) must eventually save time, must lighten the task to which he is devoted.

(*a*) What Ortolan said to the tyro of the French law-schools, applies, *mutatis mutandis*, with signal force to the scientific (and practical) study of every European system: "—l'etude du Droit Romain n'est qu'une tête de pont pour "arriver à celle du Droit Francais; l'histoire des institutions ne se laisse pas à mi- "chemin; entre le Droit de Justinien et notre Code civil, il se trouve 13 siècles "et toute notre création nationale progressive; qu'il faut donc, à la suite et "à côté du Droit Romain, voir arriver le Droit Barbare, le Droit de la Féod- "alité, celui des Coutumes, celui de l'Eglise, celui de la Monarchie qui grandit, "qui se fortifie; et de la combinaison de ces éléments, souvent si pittoresques, "déduire la génération de notre Droit actuel."

(*b*) "During the first centuries of the middle ages, new nations and states "were struggling into existence upon the ruins of the Roman empire and of "Roman civilisation, and the intrusive elements, while they could not but de- "stroy much of what was ancient and valuable, had to pass through a long "process, in which they either were assimilated to the ancient elements, or "ultimately came forth as distinct nationalities, with new institutions and ideas."
SCHMITZ

(*c*) *Melius petere fontes quàm sectari rivulos.*

What has been said, may be not inaptly summed up by Bacon's warning and advice, which addresses, as it commends itself to the needs and to the attention of every student in every branch of scientific thought or research:

"The empirics, like ants, only lay up stores, and use "them; the rationalists, like spiders, open webs out of "themselves; but the bee takes a middle course, gather-"ing her matter from the flowers of the field and "garden, and digesting and preparing it by her native "powers. In like manner, that is the true office and "work of Philosophy."

ADDENDA ET CORRIGENDA

Preface, XII. *Add, as Note to the first line of the page;*

Kant's witty metaphor is but an opinion; "La science purement "empirique du droit est (comme la tête des fables de Phèdre) une "tête qui peut être belle; il n'y a qu'un mal, elle est sans cervelle." (Tissot)

Page 3 *Add, as Note to the quotation;*

"Accident," said Hugh Miller, "has its laws; but, uniformity is not "one of them."

5 *Add, as Note to the lines from Cowper;*

"It is the *iteration* of evil that gives forehead to the foul offender."

OWEN FELTHAM

Add, as Note to the last line in the page;

It has been wisely and well said: "No one, however much he may "desire it, can insulate himself. The strong, the wise, the just, can-"not altogether escape the control of the weak, the foolish, and the "wicked;—nay more, they cannot secure themselves from the conta-"gion of their influence. It was the insight into this truth—which "induced one [Aristotle] who, perhaps more than any, appreciated "the dignity of speculative knowledge, to declare that the true end "and object of life was not to *know* but to *act*."

JOS. WMS. BLAKESLEY

6 *Add, as Note to,* virtues simply;

It has been well observed by Mr. Burton in his introduction to Bentham's Works; "That which it may be each man's duty to do, "it may not be right for each legislator to enforce upon his subjects, "because the very act of enforcement may have in it elements of "mischief to the community, preponderant over the good accomplished "by the enforcement. In other words, it may tend to the greatest "happiness of society, that a man should voluntarily follow a certain "rule of action; but it may be injurious to the happiness of the "community in general, to compel him to follow such a rule if his "inclination be against it." Usury laws are instanced.

8 *Add, as Note to the paragraph on religious sanctions,—*

The author of the 'Ayeen Akbery' thus instructs the judicial functionaries of the empire: "—if the merit of the cause is so doubtful, "that the judge cannot take upon himself to pass a decision, he "shall propose the Ordeal." (Gladwin)

11 *Add, as Note to the close of the Section on Sanctions;*

Bentham admirably illustrates (in his 'Deontology') the operation of sanctions, both natural and civil, by the biographical contrast of his ideal characters, Timothy Thoughtless and Walter Wise.

Page 16 *Add, as Note to,*—the whole Human Race, the Moral Law.—
And this, however the Moral Law be deduced or accounted for. The superficial antagonism of schools of moral philosophy is ably reconciled or explained away by Reddie in his *Inquiries;* we extract some of his concluding sentences.
"The theories of the two sects of philosophers, of the supporters of "the principle of moral sentiment, as well as of the patrons of the "principle of utility, are both so far well founded; because, to a "certain extent, the principles of both sects have an actual existence "in nature. Each of the theories is so far erroneous, because, from "the extreme desire of generalization and simplification, each of the "principles has been pushed to a greater length, than nature or fact "warrants. But the two principles, although separate and independent, "are by no means opposed to, or inconsistent, or incompatible with "each other. And it is at least unphilosophical, from an excessive "love of simplicity and system, the great failing of speculative minds, "to attempt to separate in theory, what nature herself has combin- "ed,—what co-exists in fact. While therefore, with an Epicurus, a "Hume, or a Bentham, we calculate the number and amount, and "measure the extent of the diffusion, and the degree of intensity of "human pleasures and pains, we may, at the same time, without in- "consistency, sympathize with a Plato, a Marcus Aurelius, or a "Seneca, with a Fenelon, a Shaftesbury, a Smith, or a Brown, in "the ardent love and admiration of that incorruptible integrity, "that disinterested and generous beneficence, that devoted and enlight- "ened patriotism, which are maintained and pursued, solely as the "right and becoming exercise, by man, of the powers delegated to "him by his all-perfect Creator."

22 *Add, as Note to the first paragraph;*
Hence *Jus* (*Droit*) is defined by Kant, "—l'ensemble des conditions "sous lesquelles l'arbitre de l'un peut se concilier avec la liberté "de l'autre, suivant une loi générale de liberté." (Tissot)
"C'est donc cette même liberté qui est à la fois le mobile et le frein "des actions humaines. De cet élément primitif naissent les droits "et les devoirs. La conscience révèle le droit d' être libre; mais elle "révèle aussi l' obligation de respecter la liberté d' autrui. L' intel- "ligence change même ce devoir en une inévitable nécessité qui tire "sa certitude de la sociabilité humaine, laquelle est une autre loi de "notre existence." GIRAUD

25 *In the last line of the Note, for,* the 'right of remedy' *read,* a recognition of the 'right of remedy.'

39 *Prefix to the Note;*
—a truth which has been thus expressed: "—the science of jurispru- "dence, the pride of the human intellect, which, with all its defects

"redundancies, and errors, is the collected reason of ages, combining "the principles of original justice with the infinite variety of human "concerns—" BURKE

Page 43 *Add, as Note to the quotation from Burke,*

Eloquently has the sentiment been expanded and enforced by Massillon, Bishop of Clermont:—"We do not owe to all men the same "cares, civilities, and attentions; but to all we owe 'the truth.' "The different situations that rank and birth give us in the world, "diversify our duties with regard to each other. That of truth is "in all situations the same. We owe it to the rich as well as to "the poor; to our inferiors, as well as to our masters; to those "who hate it, as well as to those who love it, and to those who "will use it against us, as well as to those who will use it for "themselves. There are times, when prudence permits us to dissi-"mulate or hide the love we have for our brethren; but there are "none, in which we are permitted to conceal 'the truth.' In fact, "the truth is not ours; we are but its witnesses, defenders and deposi-"taries. It is the light of God in man, which ought to illuminate "the whole world; and when we conceal it, we are unjust towards "our brethren, to whom it belongs as well as to us; and ungrateful "towards the Father of Lights, who has shed it abroad in our "hearts." (Translation dedicated to the Duchess of Buccleugh, 1826)

84 *The quotation is wrong, it should have been;*

"That God of Nature who within us still
"Inclines our action, not constrains our will."

POPE

88 *In the Note, for*—at libram—*read*—et libram—

89 *Add, as Note to,*—Roman *mancipatio;*

"——une forme civile remarquable se présente et joue le rôle le "plus actif dans les relations privées, pour opérer de l'un à l'autre "la translation pacifique de la puissance (*manus*), de la propriété "(*mancipium*). C'est la solennité par la pièce d' airain et per la ba-"lance (*per æs et libram*), nommée elle-même *nexum, mancipium,* "plus tard *mancipatio*: vestige des temps où, dans les échanges, le "métal se donne encore au poids. Un *libripens* porte la balance; "cinq citoyens, représentant peut-être chacune des cinq classes censit-"aires, servent de témoins; le lingot se donne et se pèse; des paroles, "contenant la loi du contrat (*lex mancipii*), se prononcent; et "la *manus*, la puissance, est transmise de l'un à l'autre." ORTOLAN

90 *Add to Note (a);*

A few of the opening sentences of Mr. Hayes' excellent work, 'An introduction to Conveyancing,' admirably epitomise the complicated Anglican system:—

"—to consider the Law of Real Property under three principal divi-"sions. The first division embraces the period of feudal ascendancy, "when the system of tenures flourished, severe and pure——The "second division exhibits the rise and progress of equitable interests "under the name of *Uses*——The third division shews by what "legislative and judicial steps the materials supplied by the preceding "periods were rendered subservient to the progressive wants of society: "how the law of tenure was tempered by the infusion of uses, "which, in losing their fiduciary character, imparted new capabilities "to the legal dominion; while personal confidences, so inseparable "from the social state, were revived, in a more elaborate form, under "the appellation of *Trusts*."

Page 95 *Add, as Note to,* independent moral character;

"Parents may not be consenting to their moral relation; but con-"senting or not, they are bound to a long train of burthensome "duties towards those with whom they have never made a convention "of any sort. Children are not consenting to their relation, but their "relation, without their actual consent, binds them to its duties; or "rather it implies their consent, because the presumed consent of "every rational creature is in unison with the predisposed order of "things. Men come in that manner into a community with the so-"cial state of their parents, endowed with all the benefits, loaded "with all the duties of their situation." BURKE

111 *Add to the Note;*

In Professor Banerjea's valuable work, 'Dialogues on the Hindu Philosophy,' at p. 4, is quoted a passage from the 'Veda,' *viz.* "He who has begotten a son is absolved from his debt."—And the Professor explains, "The Hindus are of opinion that the happi-"ness of those who have departed to another world depends in a "great measure on the performance of certain ceremonies by their "descendants. A man is accordingly considered to be in debt to "his forefathers as long as he has no son—the hope of the family, "—as of the living so also of the dead."

114 *Add to Note (a) of the previous page;*

See directions as to proofs in an action of debt, by Paulus, *Dig.* 22, 3, 25.

151 *Add, as Note to the quotation from the Code Civil;*

M. Marçadé, in his 'Elemens du droit civil Français,' has well explained and illustrated this, *viz.* "—la force judiciaire diffère de la "force legislative, d' abord en ce qu' elle ne régit que le passé, "ensuite en ce qu'elle a pour caractère la spécialité, l'individualité. "Si les tribunaux procèdent souvent par des propositions générales, "par des principes et des considérations qui n'ont rien de particu-"lier, ce n'est que dans les motifs du jugement qu'ils vont rendre,

"et pour descendre de là au fait précis qu'ils règlent dans le dis-
"positif, qui seul constitue ce jugement."

Add, as Note to—makes a judge a legislator—,
The emperor Constantinus so held, and therefore ordained;
'Inter æquitatem jusque interpositam interpretationem nobis solis et oportet, et licet inspicere.' (Cod. 1, 14)

Page 155 *In the Note, for,* Dr. Jas. Reddie, *read* Mr. Jas. Reddie.
N. B.—The son, Dr. John Reddie, was also an accomplished jurist, and author, when very young at the Scottish Bar, of a learned and useful little treatise entitled, 'Historical Notices of the Roman Law and of the recent progress of its study in Germany' (Edinburgh, 1826). *He was, for some time, chief justice at St. Lucia, and died prematurely, at Calcutta.*

156 *Add, as Note to,*—do much to guide;
But, in the words of Ortolan when commenting upon the quixotry of the emperor Julian;
"—qu' un prince se garde bien de rêver les gouvernements en theorie;
"qu'il laisse ce soin aux philosophes; pour lui, il doit observer la
"nation qu'il gouverne, et baser les institutions qu'il prétend lui don-
"ner sur l'état moral où elle se trouve."

184 *Add, in brackets, in the Note, after,* propositions of the Pandects.—
["—de meme que les lois maritimes de quelques cités du moyen âge
"furent admises jadis comme le droit commun de l'Europe commer-
"çante, de même l'antiquité fit aux lois rhodiennes l'honneur de les
"prendre pour modèle, ou de les adopter comme une loi topique et
"technique, monument de sagesse, d'intelligence et de raison, en ma-
"tière de police de navigation. La réception de la loi rhodienne, à
"Rome, fut un hommage d'autant plus glorieux pour la vielle civili-
"sation de cette île fameuse, que les Romains, en donnant à une
"loi étrangère le droit de les gouverner, durent faire un grand sacri-
"fice de vanité nationale."] GIRAUD

202 *Add to the Note;*
"The usages and laws of nations, the events of history, the opinions
"of philosophers, the sentiments of orators and poets, as well as
"the observation of common life, are in truth the materials out of
"which the science of morality is formed; and those who neglect
"them are justly chargeable with a vain attempt to philosophise
"without regard to fact and experience—the sole foundation of all
"true philosophy." MACKINTOSH

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